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Here's What's New for 2016

Following is a list of general additions, new laws, regulations, court cases, and interpretations. Please note that this list is intended as a quick reference to newly added content — you'll find the full discussions on the pages that are cross-referenced.

The Healthy Workplaces, Healthy Families Act creates an employer mandate to provide paid sick leave. The effective date for employers to begin providing the paid sick leave benefit was July 1, 2015. Amendments to the paid sick leave law became effective July 13, 2015. This is a complex law with many subtleties and some existing ambiguities; employers with specific questions about the application of this law to their particular workforce should consult legal counsel. Read about this important employer requirement in Chapter 20, "Paid Sick Leave."

Posting and Notice Requirements

- There are mandatory updates to two required posters — *Notice to Employees - Injuries Caused by Work* and California's *Whistleblower Protection* posting. See "Required Posters and Revisions" in Chapter 2, page 10.
- All California employers must post the most recent version of the minimum wage poster, MW-2014, which includes the January 1, 2016, increase to the minimum wage. See "State and Federal Minimum Wage Posters" in Chapter 2, page 6.

Exempt and Nonexempt

- The California minimum wage rate increased on January 1, 2016, affecting the minimum salary for exempt employees. See "Minimum Salary for Exempt Employees" in Chapter 4, page 49.
- The U.S. Department of Labor (DOL) submitted proposed revisions to the federal overtime rules, including revising the federal minimum salary threshold. See "Federal Salary Basis Rules" in Chapter 4, page 50.
- For licensed physicians or surgeons, the minimum hourly rate of pay increased for 2016. See "Exemption for Physicians Paid on an Hourly Basis" in Chapter 4, page 62.
- The hourly rate for the computer professional exemption increased for 2016. See "Computer Professional Exemption" in Chapter 4, page 64.

Verifying Eligibility to Work

- The USCIS proposed changes to the *Form I-9*. See "Completing the Form I-9" in Chapter 5, page 73.
- It is a violation of California law to use E-Verify in a time or a manner not required by federal law to check the employment authorization status of an existing employee or of an applicant who has not been offered employment. See "Unlawful Practices" in Chapter 5, page 83.

Alternative Employment and Independent Contractors

- A new law expands joint employer liability for violation of specified whistleblower protections in the Labor Code. See "Liability for Employers That Contract for Labor" in Chapter 6, page 89.

- The Labor Code was amended to exclude certain employers who contract for labor and services from joint liability. See "Liability for Employers That Contract for Labor" in Chapter 6, page 89.
- A 2016 law establishes the Motor Carrier Employer Amnesty Program for port transportation companies. See "Misclassification Amnesty for Motor Carrier Employers" in Chapter 6, page 98.
- The Ninth Circuit Court of Appeals rejected a company's classification of its drivers as independent contractors because it exercised significant control over the drivers. See "Right to Control Test" in Chapter 6, page 99.
- A case currently pending before the California Supreme Court will address the issue of whether the common law right to control test should apply in a wage and hour class action lawsuit. See "Right to Control Test" in Chapter 6, page 99.
- The U.S. Department of Labor's Wage and Hour Division (WHD) released administrative guidance on independent contractor classification. See "Federal Enforcement" in Chapter 6, page 104.

Employing Minors

- A new law clarifies that a child worker's immigration status is not relevant to the issue of whether the employer violated the law or what remedies are available to the worker. See "Penalties for Incorrectly Employing Minors" in Chapter 7, page 127.

Personnel Records and Privacy

- The Ninth Circuit Court of Appeal called the legality of certain "no-rehire" provisions into question. See "Courts Rule Against Noncompetition Agreements" in Chapter 8, page 188.

Wage and Hour Law

- Provisions were added to the Labor Code, increasing the Labor Commissioner's ability to go after individuals for wage and hour violations. See "Personnel Liable for Wage Enforcement Fines" in Chapter 10, page 229.
- The Labor Commissioner can levy personal assets, including any credits, money or property belonging to an employer. See "Enforcing Judgments" in Chapter 10, page 232.
- Employers have a limited opportunity to cure two types of Private Attorneys' General Act (PAGA) violations relating to itemized wage statements. See "Category 3 Labor Code Violations" in Chapter 10, page 234.
- Employers are now prohibited from retaliating against an employee because the employee's *family member* engaged in, or is perceived to have engaged in, protected whistleblower conduct. See "Protection for Reporting Labor Code Violations" in Chapter 10, page 236.
- The U.S. Department of Labor submitted proposed revisions to the federal overtime rules, including revising the federal minimum salary threshold. See "Fair Labor Standards Act (FLSA)" in Chapter 10, page 238.

Wages, Salaries and Other Compensation

- California's minimum wage is $10 per hour, effective January 1, 2016. See "Minimum Wage" in Chapter 11, page 245.

- The state Labor Commissioner now has the authority to investigate and enforce local minimum wage and overtime provisions. See "Local Minimum Wage Ordinances" in Chapter 11, page 245.
- The state Legislature specifically addressed the issue of compensating piece rate workers for non-piece-rate time and expanded on existing court decisions. See "Calculating Compensation for Piece Rate Workers" in Chapter 11, page 250.
- Employers must separately compensate piece rate workers for rest and recovery periods at a specific hourly rate. See "Compensation for Rest and Recovery Period" in Chapter 11, page 251.
- The Labor Code requires employers to pay piece rate workers separately for "nonproductive time." See "Compensation for Nonproductive Time" in Chapter 11, page 252.
- Wage statements given to piece rate employees must contain specific information for each pay period. See "Wage Statement Requirements" in Chapter 11, page 253.
- The Labor Code contains a limited affirmative defense for employers that, in the past, may not have properly paid piece rate workers for rest and recovery periods or other nonproductive time and that face liability. See "Affirmative Defense" in Chapter 11, page 253.
- A California Supreme Court case discussed how to handle on-call time when security guards were required to stay overnight on the employer's premises. See "On-Call Resident Employees" in Chapter 11, page 269.
- The meal and lodging credits increased on January 1, 2016, when the new minimum wage became effective. See "Meals and Lodging" in Chapter 11, page 276.
- A new law limits the withholding amounts for purposes of wage garnishment. See "Garnishment Against Wages" in Chapter 11, page 276.
- A California case highlights the issue of mandatory training and when you must reimburse an employee for a training course, certificate or license that is required, by law, for the job. See "Training-Related Expenses" in Chapter 11, page 283.
- Employers with unlimited paid sick leave or paid time off policies can meet the payday notice requirement by indicating "unlimited" on either the itemized wage statement or the separate notice. See "Wage Statement Requirements for Paid Sick Leave" in Chapter 11, page 286.
- Wage statements given to piece rate employees must contain specific information for each payroll period. See "Wage Statement Requirements for Piece Rate Workers" in Chapter 11, page 286.
- The minimum wage rate for all workers on federal construction and service contracts increased to $10.15 per hour. See "Federal Prevailing Wage Law" in Chapter 11, page 292.
- Foreign labor contractors who recruit foreign workers for assignments in California must register with the Labor Commissioner by July 1, 2016, and meet registration, licensing and bonding requirements. See "Requirements for Foreign Labor Contractors" in Chapter 11, page 296.
- The U.S. Department of Labor began enforcing the final regulations regarding domestic service employees on November 12, 2015. See "Federal Domestic Service Rules" in Chapter 11, page 302.

Hours of Work and Recording Time Worked

- The California Supreme Court will review three questions related to the "seventh day of work" rule. These questions are important for California employers and could conceivably affect how employers schedule employees. See "Mandatory Days Off" in Chapter 12, page 306.

- A California court issued a ruling regarding when commute time may be compensable. See "Commute Time Compensable in Certain Circumstances" in Chapter 12, page 309.
- The U.S. Supreme Court resolved the issue of whether the time a worker spends in security screenings should be paid time under the Fair Labor Standards Act (FLSA). See "Federal Law" in Chapter 12, page 313.
- A federal district judge in California dismissed a class action lawsuit brought by workers who claimed they should have been paid for time spent undergoing mandatory security bag checks. See "California Law" in Chapter 12, page 314.
- A California appellate court held that on-call rest periods are lawful, and rest periods may be treated differently than meal periods. However, this case is now being reviewed by the California Supreme Court. See "Timing of Rest Breaks" in Chapter 12, page 318.
- A recent case highlights the danger of discouraging employees from taking meal and rest breaks. See "Do Not Discourage Employees from Taking the Meal Break" in Chapter 12, page 321.
- A new law clarifies that the Wage Orders which allow for a specific meal period waiver in the health care industry are still in effect. See "Meal and Rest Break Exceptions for Health Care" in Chapter 12, page 337.

State Disability Insurance (SDI) and Paid Family Leave (PFL)

- The Unemployment Insurance Code has been amended to reflect that a second claim filed within 60 days of the initial claim will be considered one disability benefit period. This change will be effective July 1, 2016. See "Filing Period for SDI" in Chapter 15, page 388.
- The Unemployment Insurance Code has been amended so that the seven-day waiting period is waived for someone who has already served the waiting period for an initial disability and then files a second disability benefits claim for the same or related condition within 60 days after the first claim. This change will be effective July 1, 2016. See "SDI Benefits Coverage Period" in Chapter 15, page 391.

Unemployment Insurance

- Beginning January 1, 2017, employers with 10 or more employees must file all unemployment insurance reports and returns electronically and remit all contributions for unemployment insurance premiums by electronic funds. See "Unemployment Insurance Tax Reporting Requirements" in Chapter 16, page 410.

Health and Retirement Benefits

- Congress passed legislation to repeal the Affordable Care Act's automatic enrollment provision, and the president signed the legislation into law. See "Automatic Enrollment" in Chapter 17, page 426.
- Companies with 100 or fewer employees are now eligible to provide coverage through Covered California's small business program. See "Covered California's Small Business Program" in Chapter 17, page 428.
- The IRS released final forms and instructions that will be used by employers, insurance issuers, and other entities for federal tax information reporting for 2015. See "Reporting Requirements" in Chapter 17, page 428.
- Employee salary reduction contribution limits for a health FSA will remain unchanged for 2016. See "FSA Contribution Limit and Carryovers" in Chapter 17, page 434.

- The out-of-pocket maximum for a High-Deductible Health Plan is updated for 2016. See "High-Deductible Health Plans" in Chapter 17, page 436.
- The U.S. Supreme Court issued a significant decision relating to same-sex marriage rights that can have important implications for employee benefit plans. See "Same-Sex Spouses and Domestic Partner Benefits" in Chapter 17, page 439.
- San Francisco's Health Care Security Ordinance expenditure rates are updated for 2016. See "San Francisco Health Care Security Ordinance" in Chapter 17, page 443.
- The EEOC published two separate Notices of Proposed Rulemaking describing how the ADA and GINA apply to employer wellness incentive programs that are part of group health plans. See "Financial Inducements" in Chapter 17, page 464.

Family and Medical Leave

- The California Fair Employment and Housing Council issued amendments to CFRA regulations effective July 1, 2015. This chapter notes these changes throughout. See Chapter 18, "Family and Medical Leave."
- When an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee is assigned or reports for purposes of determining leave eligibility. See "Does the Employee Work at an Eligible Worksite or Within 75 Miles?" in Chapter 18, page 471.
- Same-sex marriages are lawful in California and are also now lawful in all 50 states. An employee may take leave under FMLA or CFRA to care for a same-sex spouse with a serious health condition. See "Spouse" in Chapter 18, page 473.
- Amendments to CFRA regulations address the definition of "inpatient care." See "(1) Hospital Stay" in Chapter 18, page 477.
- A medical certification for FMLA need not identify the serious health condition involved. See "Medical Leave for the Employee's Own Serious Health Condition" in Chapter 18, page 484.
- CFRA regulations provide that employers may not retroactively designate leave as CFRA leave after the employee has returned to work, except in limited circumstances. See "Retroactive Leave Designation" in Chapter 18, page 493.
- For purposes of baby bonding under CFRA, employers must grant a request for leave under CFRA of less than two weeks' duration on any two occasions and may grant requests for additional occasions of leave lasting less than two weeks. See "Baby Bonding" in Chapter 18, page 495.
- Under the FMLA and CFRA, an employee who resides in California can take time off to care for a same-sex spouse with a serious health condition. The CFRA specifically includes same-sex spouses. See "Registered Domestic Partners Versus Same-Sex Spouses" in Chapter 18, page 500.
- An employer has the burden of proving that an employee fraudulently obtained or used CFRA leave. See "Refusing Reinstatement After Family and Medical Leave" in Chapter 18, page 507.
- An employee who is engaged in outside employment during family and medical leave in violation of employer policy may be subject to disciplinary action in certain circumstances. See "Outside Employment and CFRA Leave" in Chapter 18, page 512.

Pregnancy Disability Leave

- The Fair Employment and Housing Council submitted proposed Fair Employment and Housing Act regulations to the Office of Administrative Law for approval. These proposed regulations include changes relating to pregnancy disability leave. See Chapter 19, "Pregnancy Disability Leave (PDL).

- A decision from the U.S. Supreme Court serves as a good reminder to employers of their duty to accommodate pregnant workers. See "When a Pregnant Employee Requests a Transfer" in Chapter 19, page 525.

Paid Sick Leave

- The Healthy Workplaces, Healthy Families Act (the Act) creates an employer mandate to provide paid sick leave. The effective date for employers to begin providing the paid sick leave (PSL) benefit was July 1, 2015. See Chapter 20, "Paid Sick Leave."
- The Act was amended effective July 13, 2015. The most significant amendments affected the various accrual options. See Chapter 20, "Paid Sick Leave."
- For purposes of paid sick leave, the 30 days of work must be for the same employer to qualify for accrued sick leave. See "Employees Entitled to the Benefit" in Chapter 20, page 536.
- The amendments excluded specified public retired annuitants from coverage under the Act. See "Employees Entitled to the Benefit" in Chapter 20, page 536.
- The Act provides employers with various options by which to satisfy the requirement to provide employees with paid sick leave. These options were affected by the July amendments. See "Calculating Leave - Employer Options" in Chapter 20, page 537.
- The Labor Commissioner issued an opinion letter regarding California's PSL law. The opinion letter answers questions relating to how an employer provides 24 hours or three days of PSL when employees don't work a traditional eight hour day schedule. See "Non-Traditional Work Schedules and Providing '24 Hours or Three Days'" in Chapter 20, page 541.
- The Act does not say whether you can require the employee to provide medical certification of the need for paid sick leave. However, according to the Labor Commissioner, denying leave because an employee failed to provide a doctor's note or other details about the leave may lead to a claim against the employer for violation of the Act. See "Parameters of Paid Sick Leave Use" in Chapter 20, page 543.
- Employers can use any one of three methods to pay employees for sick days. These methods were affected by the July amendments. See "Paying the Employee for the Sick Day" in Chapter 20, page 543.
- An employer is not required to reinstate accrued paid time off to an employee who was paid out at the time of termination, resignation or separation of employment. See "Employee Leaves Employment and Reinstatement" in Chapter 20, page 544.
- Employers in the broadcasting and motion picture industries covered by Wage Order 11 or 12 do not have to comply with the payday notice requirement until January 21, 2016. See "Payday Notice" in Chapter 20, page 546.
- Multiple jurisdictions also provide mandatory PSL benefits — on both the local and the national level. See "Mandatory Paid Sick Leave in Other Jurisdictions" in Chapter 20, page 549.
- Legislation effective January 1, 2016, made technical amendments to California's kin care law to conform to the mandatory PSL law. See "Kin Care" in Chapter 20, page 551.
- Kin care time can be used when the employee is absent for any of the reasons covered under the PSL law. See "Kin Care Coverage" in Chapter 20, page 551.

Vacation, Paid Time Off and Holidays

- There are legal risks to unlimited vacation policies in California. See "Unlimited Vacation Policies" in Chapter 21, page 560.

Miscellaneous Time Off

- Military service leave protections now apply to California employees who are members of the National Guard in another state and are called into service by the other state or by the president, causing them to leave a private job in California. See "Military Service Leave (California)" in Chapter 22, page 579.
- California significantly expanded the scope of school and child care activities leave, including expanding the reasons an employee can take the leave and who can take leave. See "School and Child Care Activities Leave" in Chapter 22, page 589.

Ensuring Workplace Safety

- Cal/OSHA revised the heat illness standard effective May 1, 2015. See "Avoiding Heat Illness" in Chapter 23, page 623.
- Cal/OSHA's standard for providing water was revised. See "Providing Water" in Chapter 23, page 625.
- Cal/OSHA's standard for providing shade was revised. See "Providing Shade" in Chapter 23, page 625.
- The revised heat-illness standard places new obligations on covered employers during periods of high-heat. See "Implementing High-Heat Procedures" in Chapter 23, page 627.
- The high-heat procedures have been modified for agricultural employers. See "Agriculture Employers" in Chapter 23, page 629.
- The revised heat-illness standard contains more detailed requirements regarding emergency response procedures. See "Emergency Response Procedures" in Chapter 23, page 629.
- The revised heat-illness standard sets new acclimatization procedures that apply to all outdoor places of employment. See "Acclimatization" in Chapter 23, page 630.
- Training requirements were expanded when the revised heat illness standard became effective. See "Training Employees" in Chapter 23, page 630.
- You must establish, implement and maintain a written Heat Illness Prevention Plan. See "Documenting Heat Illness Prevention Procedures" in Chapter 23, page 632.

Violence in the Workplace

- Cal/OSHA requires specified hospitals to establish workplace violence prevention plans to protect health care workers and other facility personnel from aggressive and violent behavior. See "Industry-Specific Workplace Violence Requirements" in Chapter 24, page 656.

Workers' Compensation

- In workers' compensation cases where the employee is represented by an attorney, the parties may obtain assignment of a three-member panel of medical legal evaluators to determine the nature and extent of benefits. See "Workers' Compensation Benefits and Administration" in Chapter 25, page 660.

- California law imposes liability for the failure to obtain workers' compensation coverage on both the labor contractor as well as the contracting business. See "Workers' Compensation Coverage Agreements Between Employers" in Chapter 25, page 661.
- A decision from the California Supreme Court clarified that employment need only be one of the contributing causes without which the injury would not have occurred. See "Covered Injuries" in Chapter 25, page 665.
- Amended regulations and forms relating to the predesignation process were finalized on July 1, 2014. See "Predesignating a Personal Physician, Chiropractor or Acupuncturist" in Chapter 25, page 680.
- The deadline to file a claim is extended for dependents of safety officers injured during active service in certain circumstances. See "Death Benefits" in Chapter 25, page 673.
- The Division of Workers' Compensation (DWC) issued regulations relating to the required workers' compensation poster and to the *DWC-1 Claim Form*. See "Workers' Compensation Poster and MPN Posting" in Chapter 25, page 677.
- An employee has 30 days in which to file the appeal along with any other relevant information under Independent Medical Review. See "Independent Medical Review and the Appeal Process" in Chapter 25, page 682.
- The DWC implemented a $120 million return to work fund. See "Return to Work Incentives" in Chapter 25, page 691.

Employment Discrimination

- New legislation expands California whistleblower protections to protect employees from retaliation when a *family member* has engaged in protected whistleblower activity. See "California Provides Broad Protections" in Chapter 26, page 707.
- California expanded joint employer liability for violation of whistleblower protection laws. See "California — Enforcement of Whistleblower Protections" in Chapter 26, page 709.
- The U.S. Supreme Court allowed a fired air marshal to proceed with his whistleblower claim. See "Limit to Federal Whistleblower Protection" in Chapter 26, page 711.
- The Ninth Circuit ruled that uninvited questions about retirement coupled with other age-related comments or actions may be evidence of discrimination. See "Examples of Age Discrimination" in Chapter 26, page 715.
- The issue of defining "substantially younger" was addressed by a federal Ninth Circuit case. See "Substantially Younger Person" in Chapter 26, page 717.
- California law prohibits the state from entering into contracts for goods or services of $100,000 or more with a contractor that discriminates between employees on the basis of gender identity. See "Gender Identity and Expression" in Chapter 26, page 720.
- The EEOC filed several lawsuits on behalf of transgender workers. See "Gender Identity and Expression" in Chapter 26, page 720.
- California enacted the Fair Pay Act, which revises and expands previous state law relating to gender pay inequality or disparity and provides greater protections than federal law. See "Gender Wage Equality — Fair Pay Act" in Chapter 26, page 722.

- The U.S. Supreme Court issued a significant decision relating to same-sex marriage rights. See "Marital Status" in Chapter 26, page 728.
- New legislation specifically clarifies that the mere act of requesting a reasonable accommodation of a religious belief is a protected activity. See "Reasonable Accommodation and Religion" in Chapter 26, page 735.
- The U.S. Supreme Court issued its ruling in a closely followed religious discrimination case. See "Accommodation of Religious Dress" in Chapter 26, page 736.
- The Fair Employment and Housing Council submitted proposed FEHA regulations to the Office of Administrative Law for approval. See "California's Fair Employment and Housing Act (FEHA)" in Chapter 26, page 739.
- Employers cannot prohibit employees from disclosing their wages, discussing the wages of others or asking about another employee's wages. See "Protection for Discussing Working Conditions" in Chapter 26, page 753.
- A final rule published by the Office of Federal Contract Compliance Programs added sexual orientation and gender identity to the list of protected categories for federal contractors and subcontractors. See "Affirmative Action and Federal Contractors and Subcontractors" in Chapter 26, page 777.

Sexual Harassment

- The Fair Employment and Housing Council submitted proposed FEHA regulations to the Office of Administrative Law for approval. See "California Law and Sexual Harassment" in Chapter 27, page 786.
- A recent California case emphasizes that outside contractors are protected from sexual harassment. See "Independent Contractors and Sexual Harassment" in Chapter 27, page 787.

Disabilities in the Workplace

- A court ruled that an inability to work under a particular supervisor because of anxiety and stress is not a disability recognized in California's FEHA. See "Inability to Work Under a Particular Supervisor May Not Be Covered" in Chapter 28, page 840.
- A California court confirmed that reasonably accommodating an employee with a disability does not include putting an employee into a position that he/she is not qualified for. See "Reassignment as a Reasonable Accommodation" in Chapter 28, page 851.
- The Ninth Circuit Court of Appeals ruled that an employee who was fired after threatening to kill some of his co-workers was not entitled to sue his former employer for disability discrimination. See "Reasonable Accommodation and Hostile Conduct" in Chapter 28, page 858.
- The EEOC published two separate Notices of Proposed Rulemaking describing how the ADA and GINA apply to employer wellness incentive programs that are part of group health plans. See "Employee Health and Wellness Programs and Disability-Related Inquiries and Examinations" in Chapter 28, page 870.
- Effective January 1, 2016, the mere act of requesting a reasonable accommodation is protected activity, and an employer cannot discriminate or retaliate against a person for requesting the accommodation. See "Failure to Accommodate Claims" in Chapter 28, page 872.

Disciplining and Terminating At-Will Employees

- The California Supreme Court granted review of a case that held that a retirement also constitutes a "quit" under the Labor Code for purposes of final pay. See "Voluntary Quit Defined" in Chapter 29, page 902.

Layoffs and Plant Closings

- New California legislation provides job protections to grocery store workers when a grocery store changes ownership. See "Rights of Grocery Workers" in Chapter 30, page 915.

Labor Relations in Private Employment

- The National Labor Relations Board (NLRB) issued a long-awaited decision that expansively broadened the definition of a "joint employer." See "Joint Employer Issues" in Chapter 31, page 931.
- The NLRB recently held that a single employee may engage in protected concerted activity if he/she acts on the authority of other employees, brings group complaints to the employer's attention, attempts to induce group action or seeks to prepare for group action. See "Protected Concerted Activity in Union and Non-Union Workplaces" in Chapter 31, page 950.
- In a line of recent decisions, the Board has made it more difficult for an employer to maintain the confidentiality of workplace investigations involving employee interviews because, under Section 7, employees have the general right to discuss workplace issues amongst themselves. See "Employer Investigations" in Chapter 31, page 951.
- The NLRB has issued a series of decisions that restrict the ability of an employer to include a class action waiver in a workplace arbitration procedure. See "Arbitration Agreements" in Chapter 31, page 953.
- The Board continues to target vague and overly broad language in employee handbooks or employment policies if the language creates a "chilling effect" on protected concerted activity. The Board has overturned discipline, terminations and representation elections because of impermissible or overbroad policy language. See "Employee Handbooks and Employment Policies" in Chapter 31, page 954.
- On March 18, 2015, the NLRB general counsel issued *Memorandum GC 15-04* summarizing recent Board decisions concerning employee handbook rules and policies. See "Employee Handbooks and Employment Policies" in Chapter 31, page 954.
- The Board held that a company's confidentiality agreement violated the NLRA because it was vague and an employee could interpret it as barring him/her from engaging in protected concerted activities, such as discussing human resources related information or wages. See "Overly Broad Confidentiality Provisions" in Chapter 31, page 957.
- An Administrative Law Judge (ALJ) found that a dress code policy violated the NLRA because it could reasonably be understood to prohibit workers from wearing union insignias or logos on their uniforms. See "Policies Against Union Insignia" in Chapter 31, page 959.
- The NLRB ruled that employees who have access to an employer's email system as part of their job can use the email system during non-working time to communicate about wages, hours, working conditions and union issues. See "Use of Employer's Email System for Protected Activities" in Chapter 31, page 959.

- An ALJ ruled that a school violated the NLRA by discharging a teacher who used the company email system to engage in concerted activity. See "Use of Employer's Email System for Protected Activities" in Chapter 31, page 959.
- The Board continues to analyze social media policies, striking down many as overbroad and restricting the right of employees to engage in protected concerted activities. See "Key NLRB and Court Decisions" in Chapter 31, page 962.
- Expedited election rules went into effect on April 14, 2015, often referred to as the "ambush election" or "quickie election" rules. There are several practical actions employers may want to consider. See "Representation and Election Process" in Chapter 31, page 968.

About This Book

This book is a comprehensive reference for employers. It covers all phases of the employment process, from hiring through termination.

Online Formspack

Throughout this book, you'll find references to forms and checklists that help you manage employment and comply with applicable laws.

To provide you the most up-to-date versions of all of our forms, CalChamber delivers forms via the Internet

To download all forms referenced in this book:

1. Go to www.calchamber.com/support.
2. Select **2016 Labor Law Digest** from the list of product titles.
3. Enter your product code, found on the inside front and back covers of this book, then follow the on-screen instructions. You'll have online access to all forms in this edition.

The formspack contains:

- Forms designed to help your organization avoid unnecessary litigation and to make your job easier.
- Forms to help you evaluate employee performance in support of retention, training or termination activities.
- Forms to assist you in conducting harassment investigations.
- Checklists to help you see, at a glance, if you have complied with the law and your personnel policies. Use the checklists as-is or modify them to suit your needs.

The forms on www.calchamber.com/support were developed by the California Chamber of Commerce (CalChamber) or collected from government agencies. Except for the government forms, all forms are copyrighted by CalChamber. Purchasers of this book are granted a limited license to reproduce blank forms for the sole purpose of use by the purchaser's organization.

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CalChamber Resources

CalChamber produces books, websites, newsletters and software to help employers comply with California's complex employment laws. For more information on CalChamber products, visit store.calchamber.com. Below is a brief sample of our products:

- HRCalifornia.com is a comprehensive website designed to help California human resources supervisors deal with everyday issues. It's intuitive to navigate, great for powerful searches and contains dozens of user-friendly, time-saving features.
- ***2016 HR Quick Guide for California Employers***
- ***Employee Handbook Creator*** (English or Spanish)
- ***2016 Required Notices Kit*** (English or Spanish), includes the ***2016 California And Federal Employment Notices Poster***
- ***2016 Required Notices Kit*** (English or Spanish), pamphlets only
- ***California Employer Update*** newsletter
- ***HRCalifornia Extra*** is a free email service that gives you employment law updates as they happen. Register at www.calchamber.com/enewsletters.

Throughout this book, you'll find references to many forms and checklists. As regulations can change throughout the year, accessing your forms online ensures that you will always have the most current version of each form.

Be sure to check www.calchamber.com/support occasionally for updates to forms.

Chapter 1

Which Laws Apply to You

This table helps you identify employment laws that may apply to you based on your employee count.

Law or Requirement	**All employers**	**2 or more**	**4 or more**	**5 or more**	**15 or more**	**16 or more**	**20 or more**	**25 or more**	**50 or more**	**75 or more**	**100 or more**
Affirmative Action									✓	✓	✓
Alcohol and Drug Rehabilitation								✓	✓	✓	✓
Americans with Disabilities Act (ADA)					✓	✓	✓	✓	✓	✓	✓
Cal-COBRA (health insurance continuation)*		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Child Labor	✓										
Civil Air Patrol Leave						✓	✓	✓	✓	✓	✓
Crime Victims' Leave	✓										
COBRA (health insurance continuation)							✓	✓	✓	✓	✓
Disability Insurance	✓										
Discrimination and Foreign Workers			✓	✓	✓	✓	✓	✓	✓	✓	✓
Discrimination Laws (federal)					✓	✓	✓	✓	✓	✓	✓
Discrimination Laws (state)				✓	✓	✓	✓	✓	✓	✓	✓
Domestic Violence, Sexual Assault and Stalking Victims' Leave: Legal Proceedings/Reasonable Accommodation	✓										
Domestic Violence, Sexual Assault and Stalking Victims' Leave: Medical Treatment								✓	✓	✓	✓
Employee Safety	✓										
Equal Employment Opportunity (EEO) Reporting**											✓
Family and Medical Leave (FMLA and CFRA)									✓	✓	✓
Fair Employment and Housing Act (FEHA)	✓										
Illiteracy Accommodation								✓	✓	✓	✓

Law or Requirement	**All employers**	**2 or more**	**4 or more**	**5 or more**	**15 or more**	**16 or more**	**20 or more**	**25 or more**	**50 or more**	**75 or more**	**100 or more**
Immigration Reform and Control Act (IRCA)	✓										
Injury and Illness Prevention Program (IIPP)	✓										
Independent Contractors	✓										
Jury Duty Time Off	✓										
Mandatory Supervisor Sexual Harassment Training									✓	✓	✓
Military Leave (USERRA)	✓										
Military Spouse Leave								✓	✓	✓	✓
New Employee Reporting	✓										
Organ and Bone Marrow Donor's Leave					✓	✓	✓	✓	✓	✓	✓
Paid Family Leave	✓										
Paid Sick Leave***	✓										
Posters and Notices	✓										
Pregnancy Disability Laws				✓	✓	✓	✓	✓	✓	✓	✓
Privacy	✓										
School Activities****								✓	✓	✓	✓
School Appearance Leave	✓										
Smoking in the Workplace	✓										
Unemployment Insurance	✓										
Volunteer Firefighters Training									✓	✓	✓
Volunteer Civil Service Leave	✓										
WARN Act (plant closings)										✓	✓
Workers' Compensation	✓										

*Cal-COBRA covers employers with 2-19 employees who offer health insurance benefits to employees. Cal-COBRA covers employers with 20 or more employees when the employee loses COBRA coverage, if the COBRA coverage was for less than 36 months.

**EEO reporting also applies to employers covered by Title VII who have fewer than 100 employees if the organization is owned or affiliated with another organization or there is centralized ownership, control or management so that the group legally constitutes a single enterprise, and the entire enterprise employs a total of 100 or more employees.

***Benefit began July 1, 2015.

****A covered employer must employ 25 or more employees working at the same location.

Who Is an Employee?

Generally, employees who are actually on your payroll will be counted to determine if you are covered by a state or federal law.

The definition of who is counted as an employee may vary depending on the legal requirement at issue. For some laws, you will include temporary employees and independent contractors to determine your employee count. Any exceptions to the general rule will be noted in the discussion of the federal or state law.

When Is a Shareholder an Employee?

The United States Supreme Court said that enforcement agencies and courts could examine the relationship between a company and its shareholders to determine if they should be considered employees.

In *Clackamas Gastroenterology Associates, P.C. v. Wells*, the U.S. Supreme Court said that an individual's right to control the business determines if he/she is an employee. It relied on six factors created by the Equal Employment Opportunity Commission (EEOC) as among those to be considered:

- Can the organization hire or fire the individual or set the rules and regulations for his/her work?
- What is the extent to which the organization supervises his/her work?
- Does he/she report to someone higher in the organization?
- How much influence is he/she able to exert over the organization?
- What relationship is intended, as expressed in oral or written agreements?
- Does he/she share in the profits, losses and liabilities of the organization?

Though not exhaustive, the list illustrates the factors that enforcement agencies and courts can use to determine if shareholders, directors, officers or partners in a small business are to be treated as employees for enforcement purposes.[1]

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[1] *Clackamas Gastroenterology Associates, P.C. v. Wells*, 123 S. Ct. 1673 (2003)

Chapter 2

Posting and Notice Requirements

State and federal laws require employers to conspicuously display a variety of posters in all workplaces where they can be easily read by employees and job applicants. Additionally, employers must distribute notices or pamphlets to their employees either when hired or in connection with certain events. Failure to comply with these requirements can be punishable by a fine, imprisonment or both.

This chapter discusses how to comply with these requirements by indicating which posters you must display, how to display them, other notices or pamphlets you must distribute, and when.

Posters

"Required Posters and Revisions" on page 10 shows postings required for California employers, including:

- Poster title and version number
- Which employers are covered by each posting law or regulation
- The government agency (source) that makes the poster available to employers
- The current poster date

Mandatory Postings and Obtaining Posters

You can purchase the ***2016 California and Federal Employment Notices Poster***, consisting of the posters required for California employers, from CalChamber. The posters are updated when there are mandatory changes, and can be purchased in English or Spanish versions. CalChamber's ***2016 California and Federal Employment Notices Poster*** includes federal and state family and medical leave posters (required for employers with 50 or more employees), a pregnancy disability leave poster and the California mandatory paid sick leave poster (Healthy Workplaces, Healthy Families Act of 2014).

You may be required to display additional posters if your business is located in San Francisco or if your workplace involves certain types of workers, equipment or chemicals. For more information, or to order the ***2016 California and Federal Employment Notices Poster***, call (800) 331-8877 or visit our online store at store.calchamber.com.

Penalties for Violating Posting Requirements

Different posting requirements contain different penalties. For some required postings, it is a misdemeanor, punishable by fines and/or imprisonment, if you fail to comply.

Special Information About Posters

Special information applies to some posters.

State and Federal Minimum Wage Posters

Although you must pay the state minimum wage (because it is higher than the federal rate), you must display both the state and federal minimum wage posters.

New 2016

The California minimum wage is $10.00/hour. All California employers most post the most recent version of the poster, MW-2014.

Wage Orders Posters

California law requires you to post your Industrial Welfare Commission (IWC) Wage Order(s) in the workplace. The Wage Orders were updated in 2014 (Rev. 07/2014). For a description of each Wage Order, see "California's Wage Orders" in Chapter 10, page 218.

Go to www.calchamber.com/hrcalifornia/hr-library/posters-pamphlets/Pages/required-posters-pamphlets.aspx for more information on which Wage Order to post and to ensure that you have the most current version. If you are unsure which Wage Order covers your business, CalChamber members can use the Wage Order Wizard at www.calchamber.com/wageorders.

Unemployment and Disability Insurance Poster

If you are covered by the unemployment insurance (UI), state disability insurance (SDI) and Paid Family Leave (PFL) benefit programs, the law requires you to post a notice informing employees of their rights under those programs (*Form DE 1857A - Notice to Employees - Unemployment Insurance, State Disability Insurance and Paid Family Leave*). However, some employers are covered by only one of the programs and should not post the notice informing employees of their rights under the other programs. If you are covered by UI only, use *Form DE 1857D - Notice to Employees Unemployment Insurance Benefits*.[1]

If you are covered by SDI only, use *Form DE 1858 - Notice to Employees Disability Insurance, Paid Family Leave*. The ***2016 California and Federal Employment Notices Poster***, available from CalChamber, contains the *Form DE 1857A* (explaining UI, SDI and PFL rights). Employers not covered by all three programs should use either the *Form DE 1857D* or *DE 1858*.

All three forms and posters are available from the Employment Development Department (EDD).

Pamphlets and Notices

Various state and federal laws and regulations require you to distribute notices and informational pamphlets to your employees. Some notices are distributed at the time of hiring or termination. Other notice requirements are triggered by events, such as disability leave. Required notices are discussed throughout this ***Digest***. Some of the important categories are discussed below.

Provide Wage Information Upon Hire

Nonexempt employees must be provided with specific wage information at the time of hire. The Labor Commissioner prepared a form that complies with the specific requirements.[2] This form was updated with information on the mandatory paid sick leave law (use Rev. 9/2014). For more information, see "Providing Wage Information Upon Hire" in Chapter 3, page 41.

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[1] 22 CCR sec. 1089-1(b)(1)

[2] Lab. Code sec. 2810.5

Unemployment and Disability Insurance Pamphlets and Notices

California's EDD requires you to distribute the following pamphlets, available free of charge from EDD. You must distribute the pamphlet *DE 2320 - For Your Benefit*, explaining California's UI, SDI and PFL programs, when you terminate or lay off an employee or place an employee on a leave of absence. It must be distributed no later than the effective date of the termination or layoff or the beginning of the leave of absence.[3] Copies of this pamphlet, updated to reflect increased UI benefits as well as other changes to the UI system, are available from the state's EDD or CalChamber.

You must distribute the *DE 2515 - State Disability Insurance Provisions* pamphlet, explaining an employee's disability insurance rights to all new hires, within five days of hire. You must give another copy of the pamphlet to any employee who is unable to work because he/she is ill, injured or hospitalized due to causes not related to work, or is disabled due to pregnancy, childbirth or related medical conditions.[4] This pamphlet is available from the EDD or CalChamber.

The employee pamphlet for California Paid Family Leave is available from CalChamber at store.calchamber.com.

Workers' Compensation Pamphlets and Notices

You must give all new employees a workers' compensation pamphlet to inform them of their rights and obligations under workers' compensation.[5] You must provide this information to new employees no later than the end of the first pay period. This pamphlet is an addition to the required poster. Most workers' compensation carriers provide these informational pamphlets to covered employees, or you can obtain suitable pamphlets in English or Spanish from CalChamber. You can order online at store.calchamber.com.

Make sure you are using the most recent version of this required pamphlet and posting.

Sexual Harassment Pamphlets and Notices

Every California employee must receive a sexual harassment pamphlet from his/her employer.[6] This pamphlet is in addition to any posting or employee handbook policy. You can design a pamphlet that complies with the law, or obtain preprinted pamphlets in English or Spanish from CalChamber at store.calchamber.com or the Department of Fair Employment and Housing (DFEH).

Termination, Layoff and Leaves of Absence Pamphlets and Notices

Unemployment Insurance Code section 1089 requires you to give immediate written notice to an employee of his/her termination, layoff or leave of absence. This notice must contain all of the following information, at a minimum:

- The employer's name
- The employee's name
- The employee's Social Security number

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[3] 22 CCR secs. 1089-1(b)(3), 1089-1(d)(1)

[4] *California Employer's Guide*, Employment Development Department

[5] Lab. Code sec. 3551

[6] Govt. Code sec. 12950

- The type of action (termination, layoff, leave of absence or a change in status from employee to independent contractor)
- The date of the action[7]

Though there isn't a required format for this notice, a sample *Notice to Employee as to Change in Relationship* is provided in your online formspack.

Health Insurance Pamphlets and Notices

If you have 20 or more employees and you provide them with health insurance, under certain conditions you must notify terminating or voluntarily resigning employees of the availability of continued health insurance coverage at the state's expense.[8] This notice is in addition to any Consolidated Omnibus Budget Reconciliation Act (COBRA) notice requirements under federal law.

Your online formspack includes sample Health Insurance Premium Payment (HIPP) program notices (in English and Spanish): *HIPP Notice* and *HIPP Notice - Spanish*.

Notification of Earned Income Tax Credit Pamphlets and Notices

California employers must notify all employees that they may be eligible for the federal Earned Income Tax Credit (EITC). You must include this notice within one week of providing an annual wage summary, such as a *Form W-2* or *Form 1099*. Posting this notification on a bulletin board or sending it using mail or email is insufficient, although you can use those means in addition to individual notifications. You must hand the notification directly to the employee or mail it to the employee's last known address.

You can create your own EITC notification form. Include instructions for employees to obtain any notices available from the IRS, including the IRS Notice 797, *Form W-5 - Earned Income Credit Advance Payment Certificate* or any successor notice or form. The Earned Income Tax Credit Information Act provides the following sample language to use:

> "Based on your annual earnings, you may be eligible to receive the Earned Income Tax Credit from the federal government. The Earned Income Tax Credit is a refundable, federal income tax credit for low-income working individuals and families. The Earned Income Tax Credit has no effect on certain welfare benefits. In most cases, Earned Income Tax Credit payments will not be used to determine eligibility for Medicaid, supplemental security income, food stamps, low-income housing, or most temporary assistance for needy families' payments. Even if you do not owe federal taxes, you must file a tax return to receive the Earned Income Tax Credit. Be sure to fill out the Earned Income Tax Credit form in the federal income tax return booklet. For information on your eligibility to receive the Earned Income Tax Credit, including information on how to obtain the IRS Notice 797 or Form W-5, or any other necessary forms and instructions, contact the Internal Revenue Service by calling 1-800-829-3676 or through its website at www.irs.gov."

You must process a *Form W-5* for advance payments of the EITC upon the employee's request, as required by federal law.[9] Consult with your payroll service, accountant and/or legal counsel about compliance with tax laws.

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[7] 22 CCR sec. 1089-1(d)(2)

[8] Lab. Code sec. 2807

[9] Revenue and Taxation Code secs. 19850-19854

Deferred Compensation Plans Pamphlets and Notices

You must provide employees to whom you offer an employer-managed deferred compensation plan with a notice about the plan prior to enrollment and quarterly notices thereafter.[10]

The written notice that you give to the employee prior to enrollment must include all of the following:

- The reasonably foreseeable financial risks accompanying participation in the plan.
- Any historical information to date about the performance of the investments or funds available under the plan.
- An annual balance sheet, annual audit or similar document that describes your financial condition as of a date no earlier than the immediately preceding year.

If you directly manage the investments of a deferred compensation plan, you must provide a written report to all employees enrolled in the plan within 30 days after the end of each calendar quarter.

This report should contain all of the following:

- A summary of your current financial condition.
- A summary of the financial performance during the preceding quarter for each investment or fund available under the plan.
- A description of the actual performance of the employee's funds that were invested in each investment or fund in the plan.

You can delegate these obligations to a plan supervisor, who can contract with an investment supervisor for that purpose.

The law does not require any of these notices if the employee is enrolled in a deferred compensation plan that is self-directed through a financial institution.

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[10] Lab. Code sec. 2809

Required Posters and Revisions

The information in the following charts is current as of November 2015.

Federal Law

Title	**Posting Requirement**	**Who Must Post?**	**Source**	**Version and Date**
Employee Polygraph Protection Act	The poster must be displayed where employees and applicants for employment can readily observe it.	All employers	U.S. Dept. of Labor	WHD 1462 Rev. Jan 2012 and WHD 1462SP Rev. Jan 2012
Equal Employment Opportunity is the Law	Post copies of the poster in conspicuous places available to employees, applicants for employment, and representatives of labor organizations with which there is a collective bargaining agreement.	All employers	Equal Employment Opportunity Commission	EEOC-P/E-1 Revised 11/09 Includes GINA
Federal Family and Medical Leave Act	Covered employers are required to display a copy of the poster prepared by the Department of Labor summarizing the major portions of the FMLA. Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall be responsible for providing the notice in a language in which the employees are literate.	Employers of 50 or more employees and all "public agencies"	U.S. Dept. of Labor	WHD Publication 1420 Revised February 2013 and WH1420SP Rev 09/2013
Federal Minimum Wage	Every employer of employees subject to the Fair Labor Standards Act's minimum wage provisions must post, and keep posted, a notice explaining the act in a conspicuous place in all of their establishments so as to permit employees to readily read it. Both the state and federal minimum wage posters must be posted, even though California's minimum wage is currently higher than the federal minimum wage.	All employers	U.S. Dept. of Labor	WHD Publication 1088 (Revised July 2009) and WHD 1088SPA (Revised July 2009)
Your Rights Under USERRA (Veterans Benefits)	Employers may provide the notice, "Your Rights Under USERRA," by posting it where employee notices are customarily placed. This posting must be in English.	All employers	U.S. Dept. of Labor	Publication Date — October 2008

California Law

Title	Posting Requirement	Who Must Post?	Source	Version and Date
California Minimum Wage	The Department of Industrial Relations requires employers to post information related to wages, hours and working conditions in an area frequented by applicants and employees where it may be easily read during the workday. Both the state and federal minimum wage posters must be posted, even though California's minimum wage is currently higher than the federal minimum wage. In addition to English, this poster must also be posted in Spanish if you have workers who speak and read only in Spanish (requirement stated by Industrial Welfare Commission).	All employers	Industrial Welfare Commission	MW-2014
California Wage Orders	The Department of Industrial Relations requires employers to post information related to wages, hours and working conditions in an area frequented by applicants and employees where it may be easily read during the workday.	All employers	Dept. of Industrial Relations	There are 17 Wage Orders with various version dates
Discrimination and Harassment in Employment are Prohibited by Law	The Department of Fair Employment and Housing requires employers to post information related to the prohibition against discrimination and harassment in a conspicuous place. Employers employing significant numbers, no less than 10% of their work force, of non-English speaking persons (e.g., Chinese or Spanish speaking) at any facility or establishment must also post in the appropriate foreign language at each such facility or establishment.	All employers	Dept. of Fair Employment and Housing	DFEH-162 (11/14) DFEH-162S (11/14)
Emergency Phone Numbers	The Department of Industrial Relations requires employers to post a list of telephone numbers of emergency responders. Must be posted near the job telephone, telephone switchboard, or otherwise made available where no job site telephone exists.	All employers	Dept. of Industrial Relations and Division of Occupational Safety & Health	S-500 March 1990

California Law				
Title	**Posting Requirement**	**Who Must Post?**	**Source**	**Version and Date**
Joint Notice for Family Care and Medical Leave (CFRA Leave) and Pregnancy Disability Leave	Covered employers must provide notice to employees of the right to request CFRA leave in a conspicuous place where employees tend to congregate. The employer may include both pregnancy disability leave and CFRA leave in one notice. Any employer whose workforce at any facility or establishment contains 10 percent or more of persons who speak a language other than English as their primary language must translate the notice into the language or languages spoken by this group or these groups of employees.	All employers with 50 or more employees; all public employers	Dept. of Fair Employment and Housing	DFEH-100-21 (07/15) and DFEH-100-21s (07/15)
Healthy Workplaces/ Healthy Families Act of 2014 Paid Sick Leave	The Division of Labor Standards Enforcement requires all employers to post information to advise employees of their sick leave rights.	All employers	Division of Labor Standards Enforcement	11/2014
Notice to Employees - Injuries Caused by Work	The Department of Industrial Relations requires employers to post information advising employees of workers' compensation benefits in a conspicuous location frequented by employees where it can be easily read during the workday. This poster should be posted in English and Spanish if an employer has Spanish-speaking employees.	All employers	Division of Workers' Compensation	DWC 7 (1/1/2016)
Notice to Employees - UI, SDI, PFL	The Employment Development Department requires covered employers to post information regarding unemployment insurance, state disability insurance, and paid family leave in a prominent location that is easily seen by employees. EDD posting DE 1857D gives employees notice of their rights under the Unemployment Insurance program and is intended for use by employers who are not subject to SDI/PFL. CalChamber includes the DE 1857A because it contains not only the UI information but the SDI/PFL information as well.	All employers	Employment Development Dept.	DE 1857A Rev. 42 (11/13) DE 1857A/S Rev. 42 (11/13)
Pay Day Notice	The Department of Industrial Relations requires employers to post information regarding pay days in a conspicuous place at the place of work, or otherwise where it can be seen as employees come or go to their places of work, or at the office or nearest agency for payment kept by the employer.	All employers	Dept. of Industrial Relations	DLSE 8 (Rev 06/02)

California Law

Title	Posting Requirement	Who Must Post?	Source	Version and Date
Safety and Health Protection on the Job	The Division of Occupational Safety and Health requires employers to post information on pertinent safety laws and regulations and rights of employees in a conspicuous place where notices are customarily posted. The notice shall be posted at each location to which employees report each day.	All employers	Dept. of Industrial Relations and Division of Occupational Safety & Health	No version number August 2015
Time Off for Voting	The California Secretary of State requires employers to post information regarding employees' right to take time off to vote. The notice must be posted at least 10 days before a statewide election.	All employers Must be posted for 10 days preceding statewide election	California Secretary of State	No version number (No date)
Whistleblower Protection	Employers must prominently display a list of employees' rights under the whistleblower laws, including the telephone number of a whistleblower hotline maintained by the Office of the Attorney General. Lettering must be larger than size 14 point type.	All employers	Dept. of Industrial Relations	No version number (Updated for 2016)
Your Rights and Obligations as a Pregnant Employee Notice A	Covered employers must provide notice to employees of the right to request pregnancy disability leave. The notice must be posted in a conspicuous place where employees tend to congregate.	All employers with 5- 49 employees	Dept. of Fair Employment and Housing	DFEH-100-20 (11/12) and DFEH-100-20s (03/13)

Required for San Francisco Employers

Title	Posting Requirement	Who Must Post?
San Francisco Fair Chance Ordinance	The notice must be displayed in a conspicuous place at every workplace, job site or other location in San Francisco that is under your control and frequently visited by employees or applicants. The notice must be posted in English, Spanish, Chinese, Tagalog and any language spoken by at least five percent of the employees at the workplace.	Employers who are located or doing business in San Francisco and have 20 or more employees, whether or not those employees are all located in San Francisco
San Francisco Family-Friendly Workplace Ordinance	Must be displayed at each San Francisco workplace or job site. The notice must inform employees of their rights under the Family-Friendly Workplace Ordinance.	All employers with 20 or more employees (including part-time employees) who work within the city and county San Francisco.

Required for San Francisco Employers		
Title	**Posting Requirement**	**Who Must Post?**
San Francisco Health Care Security Ordinance	Must be displayed at each San Francisco workplace. Every employer shall post such notices in English, Spanish, Chinese and any other language spoken by at least five percent of the employees at the workplace or job site.	All businesses with 20 or more employees working within the City and County of San Francisco and nonprofit organizations with 50 or more employees.
San Francisco Minimum Wage	Must be displayed at each San Francisco workplace. Every employer shall post such notices in English, Spanish, Chinese and any other language spoken by at least five percent of the employees at the workplace or job site.	All employers with employees working within the city and county of San Francisco
San Francisco Sick Leave	Must be displayed at each San Francisco workplace or jobsite. Every employer shall post such notices in English, Spanish, Chinese and any other language spoken by at least five percent of the employees at the workplace or job site.	All employers with employees working within the city and county of San Francisco

Local Minimum Wage Ordinances

New 2016

An increasing amount of California cities have posting requirements relating to minimum wage ordinances or other local employment laws. Check the local government websites for more information. For more information on local minimum wage ordinances in California, see "Local Minimum Wage Ordinances" in Chapter 11, page 245.

Posters Required With Special Circumstances

Not every employer must comply with Cal/OSHA's Log 300 record keeping requirements. Use our Log 300 Wizard, in the Forms and Tools section of HRCalifornia.com, to determine if your organization is required to record workplace injuries and illnesses. Download and use the Log 300 forms if you are not exempt. The Log 300A is not a year-round poster — it is a notice that must be posted in February, March and April of each year.

Title	Who Must Post?	Source	Version and Date
Log of Work-Related Injuries and Illnesses (Log 300)	High hazard employers of 10 or more employees	Dept. of Industrial Relations and Division of Occupational Safety & Health	Form 300 (07/2007)
Summary of Work-Related Injuries and Illnesses (Log 300A)	High hazard employers of 10 or more employees	Dept. of Industrial Relations/ Division of Occupational Safety & Health	Form 300A (07/2007)

Other unique posters and notices may be required depending on certain circumstances such as heavy equipment or forklifts, chemical use and government contracts. You can access more information on these posters and notices at www.calchamber.com/uniquepostersandnotices. This is a free webpage and does not require CalChamber membership.

Human Trafficking Disclosure Notice

Some retail sellers and manufacturers doing business in California must post a link on their website to information about the company's efforts to eradicate slavery and human trafficking from its direct supply chain.[11]

Public Posting Requirements

Some businesses must post a model human trafficking notice near the public entrance or another conspicuous location where the public and employees may view the notice.[12]

The notice provides telephone hotline numbers for the public and victims of human trafficking to seek help or report unlawful activity, and contains information about organizations that provide services to eliminate slavery and human trafficking.

The California Department of Justice (DOJ) developed a model notice.

Human Trafficking Model Notice (English)

Human Trafficking Model Notice (Spanish)

Businesses that are required to post this notice include:

- Retail sales of alcoholic beverages (On-sale general public premises licensees under the Alcoholic Beverage Control Act of the Business and Professions Code, section 23000 et. seq.)
- Adult or sexually oriented business (as defined in subdivision (a) of Section 318.5 of the Penal Code)
- Primary airports
- Intercity passenger rail or light rail stations
- Bus stations
- Truck stops (privately owned and operated facilities that provide food, fuel, shower or other sanitary facilities, and lawful overnight truck parking)
- Emergency rooms within general acute care hospitals
- Urgent care centers
- Farm labor contractors
- Privately operated job recruitment centers
- Roadside rest areas
- Businesses or establishments that offer massage or bodywork services for compensation

The notice must be at least 8.5 x 11 inches in size, written in a 16-point font and must be in English, Spanish and one other language that is the most widely spoken language in the county where the business is located and for which translation is mandated by the federal Voting Rights Act. The DOJ provides a list of counties in which a third language other than English and Spanish is the most widely spoken language and also provides additional translations of the model notice in this ***Digest***.

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[11] Civ. Code sec. 1714.43

[12] SB 1193; Civ. Code sec. 52.6

For more information on which businesses must post this notice and details on posting requirements, use the *Facts on Human Trafficking Posting* form, which contains information from the California Department of Justice.

Facts on Human Trafficking Posting

Failure to comply with the notice posting may result in a civil penalty of $500 to $1,000 per offense.

Further Information

CalChamber members can verify that you have the most up-to-date employer posters that California and federal laws require at the CalChamber Posters and Notices webpage, www.calchamber.com/requiredposters. This webpage requires CalChamber membership.

Chapter 3

Recruiting and Hiring

Recruiting new employees is a difficult task involving some legal risk. When done improperly, you can easily create discrimination liability or jeopardize the at-will employment relationship.

This chapter explains how to properly recruit, interview and hire a competent and trustworthy workforce; reduce your liability; protect your at-will employment relationship; and reduce your odds of negligent hiring claims.

This chapter also provides samples of the most commonly used forms in hiring, such as employment applications, background checks, at-will acknowledgment, hiring checklists and state and federal forms.

Creating a Job Description

Before recruiting employees, you should understand and identify the job to be performed. Without this information, the recruiter or supervisor wastes time and money during the recruiting process. Selecting a candidate who is ill-equipped for the job may require you to provide more training or result in the new employee's failure in the job.

Why You Need Job Descriptions

No specific law requires you to create job descriptions or dictates what they should contain. Yet, you should create and maintain a job description for every job in your organization. Effective job descriptions provide your executives, supervisors and employees with a clear understanding of how each job fits into your organization's structure and contributes to the achievement of the organization's mission.

Job descriptions clearly set forth job duties and expectations by:

- Taking the uncertainty out of differentiating between the expectations and requirements of various jobs
- Minimizing employee discontent associated with salary differences between jobs
- Clarifying the job's role and the expectations for the person performing the job
- Guiding initial training and helping management and employees agree on the expected outcomes of that training
- Supporting the performance evaluation process
- Supporting the proper classification of the employee as exempt or nonexempt

By using the job description, the recruiter and candidates possess a clear understanding of the job during the interview. This practice allows candidates to determine if the job is right for them and helps them understand where personal deficiencies may limit their employability, potentially saving the organization valuable time, resources and exposure to litigation.

Job descriptions form the basis for job evaluations. Where performance fails to meet expectations, the job description provides direction for further training. Where widespread performance deficiencies are observed, job descriptions provide a focus for identifying organizational weaknesses. Job descriptions also help when determining compensation systems and levels. They are the starting point for analyzing each job's functions and determining the relative value of the job within the organization and the job market.

From a defensive viewpoint, job descriptions provide clear recruiting guidelines and performance expectations, which may help you defend against claims of discrimination in the hiring and promotion process. Job descriptions define the job's scope and nature.

Well-written job descriptions provide an organization with solid legal backing about any decisions made about jobs and people, including compensation systems, exempt/nonexempt classification and salary levels. They can be used as supporting documentation for disciplinary decisions based on failure to meet job expectations. They can also guide decisions when dealing with reorganizations or reductions in force.

Use the following explanations of a job description's components to write effective job descriptions for your organization. Each of the components contributes to an overall picture of the requirements for and expectations of the person required to fill the position.

Job Title

The job title is the name you use to identify the job. Often, the job title is the last item you decide on because preparing the job description can guide you to selecting an appropriate job title. If you add a new function to an existing job, the new job title can match a previous job, but you can designate it as a higher level, such as "Clerk II" or "Senior Mechanic."

Job Summary

Similar to the job title, you may want to wait until you have written the rest of the job description before you write the job summary. The job summary is a one- or two-paragraph summary of the job's essential functions and reporting relationships.

Essential Job Functions

When considering candidates for job openings and promotions, you may find qualified applicants who have a disability. You must determine if the person with a disability can perform the essential functions of the job. For more information, see ""Qualified" Individual Defined" in Chapter 28, page 846 and "'Essential Job Functions' Defined" in Chapter 28, page 846. A job function is considered essential if it constitutes the job's fundamental duties or if the job exists to perform that function.[1]

A properly developed job description identifies the job's physical and mental demands, the educational prerequisites and the experience required. These predefined standards are often valuable when an employee requests accommodation or when defending against wrongful termination lawsuits.

The essential functions component is the heart of the job description. Consider if employees in the position must perform the function and if removing that function would fundamentally change the job.

There are several reasons why a job function could be essential:

- The position exists to perform the function.

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[1] Govt. Code sec. 12926(f)

  - If you hire someone to proofread documents, the ability to proofread accurately constitutes an essential function because that function is why the position exists.
- A limited number of other employees are available to perform the function or the function must be distributed among a limited number of employees.
  - It may be an essential function for a file clerk to answer the telephone in an organization with only three employees, where each employee has to perform many different tasks.
- A function is highly specialized and the person in the position is hired for his/her special expertise or ability to perform it.
  - An organization expanding its business in Japan decides to hire a new salesperson. The organization requires someone with not only sales experience, but also the ability to communicate fluently in Japanese.

Knowing the job's essential functions helps you:

- Create appropriate interview questions.
- Determine if a person is qualified to perform the essential functions.
- Identify reasonable accommodations to enable a person with a disability to perform the essential functions.

Disability discrimination laws do not limit your ability to establish or change the content, nature or functions of the job. You can establish what a job is and what functions are required to perform it. The laws require that the qualifications of an individual with a disability are evaluated in relation to the job's essential functions.

In examining disability issues, the Equal Employment Opportunity Commission (EEOC) and the Department of Fair Employment and Housing (DFEH) consider various components to determine if a particular function is essential to the job, including the:

- Employer's judgment
- Accurate, current, written job descriptions
- Amount of time spent on the job performing that function
- Availability of others in the department to fill in for the person who performs the function
- Legitimate business consequences of not requiring the incumbent in the position to perform the function
- Work experience of past incumbents in the job
- Current work experience of incumbents in similar jobs
- Reference to the importance of the performance of the job function in prior performance reviews[2]

For more information, see "'Essential Job Functions' Defined" in Chapter 28, page 846.

You must determine a job's essential functions, both as the criteria for deciding the ability of a person with a disability to perform the job and as a defense against any subsequent claim of discrimination. To identify a job's essential functions, first identify the job's purpose and the importance of actual job activities to achieve this purpose. When evaluating the importance of job functions, consider the following issues:

- How frequently is the function performed?

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[2] 2 CCR sec. 11065(e)(2)

- Does the job exist to perform this function?
- Who else is available to perform this function?
- What level of expertise or skill is required to perform this function?
- What is the experience of previous or current employees in this job?
- What is the amount of time spent performing this function?
- What are the consequences of failing to perform this function?
- What is stated in the job description and employment advertisements?

Determining essential functions is one of the least clear provisions of disability discrimination laws. Therefore, you should take the following steps when determining essential functions:

1. Document all important job functions. Maintain current, detailed job descriptions setting forth essential functions for each position.

2. Be accurate and realistic. Job descriptions or definitions should describe the actual duties of the position rather than the ideal set of duties. Individuals who inflate their importance to the organization may exaggerate the extent of their duties or those of their subordinates and are not a reliable source for a description of essential job functions. Job descriptions that are easily called into question by those who know the workplace are of little or no value.

3. Stay current. Many jobs change rapidly. Periodically review and update job descriptions to ensure accuracy.

4. Be flexible. Flexibility is important when describing a job's essential functions. Tasks that can be transferred easily to another person and are not necessarily the heart of a job are unlikely to constitute essential functions. Employers who pare job descriptions down to core functions will more likely prevail in litigation than those who insist that every traditional function of a job is essential.

5. Review job descriptions with employees. It's always a good idea for you to know what employees actually do, and for employees to understand exactly what is expected of them. Review a job's essential functions with each employee to obtain his/her input and increase the job description's accuracy.

6. Document agreement. After each employee reviews the essential functions of his/her position, document that the employee reviewed and agreed to the description of the job's essential functions.

To help identify essential functions, use action words to describe an activity and draw a distinction between methods and results: Is the essential function *moving* a 50-pound box from one place to another, or is it *carrying* the box to a new location? Essential functions often need not be performed in one particular manner, unless doing otherwise would create an undue hardship. If a function must be performed in one particular manner, identify it because this unique requirement may influence determining reasonable accommodations.

Physical Requirements

Due to the requirements of the Americans with Disabilities Act (ADA) and California's Fair Employment and Housing Act (FEHA), it is important to identify a job's essential physical requirements. Describe the physical requirements in terms of the physical activity and degree of strength, flexibility and agility required and the frequency and duration of the effort that must be exerted. This requirement should not be ignored and applies to both sedentary and non-sedentary positions.

Knowledge, Skills and Experience

List all knowledge, skills and experience necessary to perform the job. You may want to divide these components into requirements and preferences, as certain attributes may be absolutely required for a particular job, and other attributes may be desirable but not necessary.

> **Example:** When hiring a medical case supervisor, a nursing degree might be required, though when hiring a supervising electrician, an electrical engineering degree might be desirable.

Except where absolutely necessary, avoid strict requirements that can prevent you from considering qualified candidates.

> **Example:** Instead of a master's degree in finance, you may be willing to substitute a bachelor's degree in finance plus 10 years of professional experience.

The requirements listed on the job description must support the essential job functions and serve as the primary criteria for selecting or rejecting candidates. Remember that under the ADA, you can't refuse to hire a qualified candidate who meets a job's requirements and whose disability can be reasonably accommodated.

Reporting Relationships

Each job occupies an important place in an organization. Each employee and others in contact with the employee must thoroughly understand that place. The job description should identify the position's place in the organization's chain of command, including the position(s) to which it reports and the position(s) reporting to it.

Financial Responsibility

If a position includes responsibility for a profit or cost center, some organizations prefer to quantify the extent of that responsibility. This aids the recruiter in evaluating the candidate's previous level of responsibility and clearly defines the expectations for the candidate or employee.

Exempt or Nonexempt Status

The information gathered for the job description helps when determining if the position is likely to be exempt or nonexempt. The determination of exempt or nonexempt status — and, if applicable, which exemption applies — should be made prior to recruitment for the position. For more information on properly classifying employees, see Chapter 4, "Exempt and Nonexempt." This determination has many implications, including ability to obtain a credit report for managerial positions. For more information, see "Obtaining Applicant and Employee Credit Reports" in Chapter 8, page 150.

This determination is a critical decision and should be confirmed by further analysis using the information provided in "Determining Exempt or Nonexempt Status" in Chapter 4, page 47, or in consultation with legal counsel.

Job descriptions should be periodically reviewed to ensure that the actual job duties support the classification of the employee as exempt or nonexempt.

! Use the sample *Job Description* to help you develop your own job descriptions.

Job Description

Preparing the Job Specification

After the job description is completed, prepare a job specification. This is a modified version of the job description that omits the details about the job. It helps whomever writes the copy for the advertisement, job posting, flyer, radio spot or other job marketing tool. The job specification includes:

- Job title
- To whom the position reports
- Job summary
- Educational requirements
- Desired experience
- Required specialized skills or knowledge
- Physical or other special requirements associated with the job
- Any occupational hazards
- Salary range
- Benefits

Finding Candidates

After you clearly identify the job and the qualities you seek in candidates, you can market the position. As with all marketing campaigns, the goal should be to get the best return on your investment. This means devising a strategy for targeting the best sources likely to yield the highest quality and quantity of candidates.

Current Employees

Union contracts or internal policies require some employers to post job opening notices to their current workforce. Whether or not you must take this step, posting a job internally is a good source of new candidates. Posting the job internally also encourages your current employees to recommend your organization to people they know. You may want to consider offering cash bonuses or other rewards for referrals that result in hiring, particularly for hard-to-fill positions.

Be careful if your current workforce appears to exclude certain minorities represented in your community or is predominantly male when female employees could fill positions. In these cases, relying entirely on the current workforce for new employees can create the appearance of excluding minorities or women.

Other Employers

Although employees of other organizations, including competitors, often present attractive targets for recruiting, recruiting an employee who is under contract with another employer presents some dangers. The other employer could win a lawsuit against you for interfering with a valid contractual relationship if you knew of the contract and engaged in intentional acts designed to induce a breach or disruption of the contractual relationship. If those acts caused an actual breach or disruption of the contractual relationship, you can face liability for any resulting damage.

Recruiting the at-will employee of another employer by offering a better job, higher pay or more favorable employment conditions doesn't make you liable to the other employer unless you engage in conduct that violates constitutional, statutory, regulatory or other legal standards. These actions can expose you to liability for interference with the former employment relationship, even with at-will employees.

Networking

Networking presents one of the best ways to find a job candidate. Tell everyone you know — friends, neighbors, professional associates, customers, vendors or colleagues from associations — about the job opening. Someone might know the perfect candidate.

Recruiting and Placement Agencies

Recruiting and placement agencies receive fees for placing qualified candidates with organizations looking for these candidates. Some agencies work on a retainer basis and charge a flat fee per placement. Others operate on a contingency basis, such as successfully placing candidates, and charge a fee that is usually related to the salary offered to the candidate they represent. If you consider using an agency, review its contract carefully to be sure you know precisely what services it provides and what you will pay.

Job Match Services

You can let your tax dollars work for you by contacting the Employment Development Department (EDD) to help you find employees. The EDD provides free job services to employers and job seekers. List your job openings in EDD's Job Match system and let the EDD refer qualified candidates to you at no charge. Look in the state government section of your local telephone directory under Employment Development Department to find the telephone number of your local EDD office or visit the agency's website at www.edd.ca.gov. CalJobs, www.caljobs.ca.gov, provides a system for linking employer job listings and job seeker resumes.

Educational Institutions

Consider listing job openings with appropriate universities, colleges and trade or vocational schools. Local school districts often run job training and placement programs for high school students. Get to know the placement counselors and teachers who train these prospective employees. Ask them to keep you in mind when they identify a student who excels in a field that fits within your organization.

Complex federal and state rules apply to employing minors. For more information, see Chapter 7, "Employing Minors."

Newspapers

Newspaper help wanted ads can be an inexpensive way of getting the word out to the general population. Don't ignore smaller, community-based newspapers if you must fill relatively low-paid positions that people will not likely commute long distances to reach.

Magazines

Trade association newsletters, professional journals and industry publications often include classified sections where you can advertise job openings. These ads offer an effective way to attract skilled people in a particular industry or profession.

Radio and TV

Using radio and TV advertisements is expensive for most employers, but can be justified in cases of mass hiring for new businesses or relocations. A radio advertisement is useful for reaching the geographic target market of a particular station, and cable TV can often be cost efficient for reaching large numbers of a targeted audience.

Internet

A variety of job-related websites allow employers to post openings. Some specialize by targeting certain skills and professions. Candidates from all over the world can search these databases so be prepared to receive and screen many applications.

If your organization maintains a website, add a jobs page where you can post open positions and accept applications and/or resumes from candidates online or via email, fax or traditional mail.

CalChamber members can access Internet recruiting sources by visiting www.calchamber.com/hrcalifornia/perks-discounts/Pages/perks-discounts.aspx.

Job Banks

Many professional associations offer job banks for their members. Contact groups related to your industry, even if they are located outside your local area, to ask them to alert their members to your staffing needs.

International Recruiting

Some employers find it necessary to go beyond U.S. borders to find certain skills because of a shortage of trained personnel in certain industries and jobs. Recruiting foreign workers is a complex process. It is advised that employers seek the assistance of legal counsel or a skilled HR expert.

Other Community Sources

Post notices at libraries, senior citizen centers and other places where candidates might congregate. Retirees who need extra income or a productive way to fill their time often make excellent employees.

Advertising the Job

There are many ways to advertise and recruit in your search for qualified candidates. Avoid actions and language that could be interpreted as discriminatory or imply any long-term employment guarantees.

When advertising a position, consider two important aspects of any proposed advertisement:

- Does it comply with all state and federal discrimination laws?
- Does it avoid reference to a secure contract that would contradict an at-will employment relationship?

If pictures or drawings of people compose part of an advertisement, be sure to feature a broad spectrum of typical employees, including minorities, women and people with disabilities.

Always consider discrimination laws when placing a job advertisement. For more information on discrimination laws, see Chapter 26, "Employment Discrimination."

Advertisements and Employment At-Will

California's Labor Code specifies that an employment relationship with no specified duration is presumed to be employment at-will.[3] This means that the employer or employee can terminate the employment relationship at any time, with or without cause and with or without notice.

Over the years, California courts and the Legislature have created exceptions to California's at-will presumption. Even where you make no written or oral contract specifying the duration of employment, various factors, including employment advertisements and applications, could create an implied contract.

For example, courts can find an implied contract if an employment advertisement describes a secure position or asks for candidates willing to make a long-term commitment to the organization. Avoid advertisements indicating your organization is "seeking a long-term employee" or "looking for someone who can grow with the organization."

When hiring, you may also want to consider relationships other than regular, direct employment. These arrangements can involve personnel provided by temporary agencies or hiring independent contractors. Create these relationships carefully; otherwise, unanticipated liabilities and penalties can arise when the worker is found to have employee status rather than the desired nonemployee status. For more information, see Chapter 6, "Alternative Employment and Independent Contractors."

Bona Fide Occupational Qualifications in Hiring

A bona fide occupational qualification (BFOQ) is a characteristic that employers are allowed to consider when making hiring decisions, even though, in other contexts, these characteristics would be considered discriminatory. For example, a religious school can require that teachers be members of the school's religion. However, religion would not be a BFOQ for an office manager position in a dentist's office.

The words you use in a job advertisement or internal job posting can be used against you by a member of a protected class who is not selected for the position. Because many people are members of some protected class, do not use any terms that might imply a preference for or prejudice against anyone unless there is a BFOQ inherent in the job. Although extremely rare, no discrimination will be found if otherwise prohibited language is used where it identifies a BFOQ.

A BFOQ based on a protected class is extremely rare. Consult legal counsel before ever listing a protected class, such as gender or religion, as a job requirement.

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[3] Lab. Code sec. 2922

Appropriate Language in Advertisements

When drafting a help wanted advertisement, avoid language indicating limitations or exclusions on the basis of race, color, national origin, religion, sex, pregnancy, age, marital status, veteran status, sexual orientation or disability. Avoid words or phrases such as "young and energetic salesman," "waitress," "repairman" and "perfect for a single person willing to travel." Replace them with "enthusiastic salesperson," "food server," "repair person," and "travel required."

You can use terms such as "experienced," as these do not discriminate against those protected by age discrimination laws.

Do use	Don't use
Enthusiastic salesperson	Young and energetic salesman
Food server	Waitress
Repair person	Repairman
Travel required	Perfect for a single person willing to travel

Affirmative Action and Advertisements

Most California employers are not required to have affirmative action programs, but for those who are, the use of illustrations depicting a diverse workforce helps increase minority applicant flow. For more information on affirmative action programs, see "Affirmative Action" in Chapter 26, page 776.

Advertisements and Disabilities

Employers must consider applicants with or without disabilities or perceived disabilities on an equal basis. Employers may not advertise an employment benefit in any way that may discourage applicants with disabilities from applying. For more information, see "Recruiting and Advertising and Disability Related Inquiries" in Chapter 28, page 864.

Applications for Employment

Employment applications help you evaluate a candidate's experience, skills, training and limitations. Though resumes are helpful tools, they often do not contain the range of information that a standardized employment application can reveal, such as the two contained in your online formspack.

You cannot require individuals to pay to apply for a job. This includes any form of payment to:

- Apply orally or in writing.
- Receive, obtain, complete or submit an employment application.
- Provide, accept or process an employment application.

Violating this law constitutes a misdemeanor.[4]

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[4] Lab. Code sec. 450

Gathering Appropriate Information on Candidates

The *Guide for Pre-Employment Inquiries* contains 19 categories of potentially discriminatory questions, as well as examples of what is prohibited and what is acceptable. Note that this list applies to all employment inquiries, whether on an application, in an interview or even during an informal lunch with a candidate.

Look carefully at any application you currently use and compare it with the *Guide for Pre-Employment Inquiries,* the sample applications contained in your online formspack. Does your employment application contain prohibited questions?

You are discouraged from asking for a Social Security number (SSN) on applications because of the potential for identity theft and California laws relating to use of SSNs. This information is not required until you reach the point of seeking the candidate's background information or until he/she is actually hired. At either of those points, other forms can be used to obtain the SSN. For more information, see "Keeping Social Security Numbers Private" in Chapter 8, page 140.

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Also, California and federal law both prohibit employers from using E-Verify to check the employment authorization status of an applicant who has not yet been offered employment. For more information, see "E-Verify" in Chapter 5, page 82.

Excluding Discriminatory Questions

California's discrimination laws are often more stringent than those in other states. Avoid using applications that are drafted and printed in another state (for example, where your organization is headquartered) unless you carefully review them for compliance with California laws.

The sample employment applications, *Employment Application - Long Form*, and *Employment Application - Short Form*, allow you to gather a great deal of pertinent information without creating liability for discrimination.

Employment Application - Long Form

Employment Application - Long Form (Spanish)

Employment Application - Short Form

Employment Application - Short Form (Spanish)

Interstate employers should use caution when implementing provisions and disclaimers for applications used in multiple states. Provisions and disclaimers can go unnoticed by candidates and, in some situations, create potential liability for you.

When reviewing your application, consider the impact of federal and state disability discrimination laws, which require reasonable accommodations for all people with disabilities. Many generic applications contain inquiries prohibited under these laws, such as "Do you have any health condition that may prevent you from performing the job for which you are applying?"

Also familiarize yourself with background check and testing requirements (see "Testing Applicants and Employees" in Chapter 8, page 148 and "Investigating Applicants" in Chapter 8, page 150), especially those relating to obtaining criminal history — an area of the law which is rapidly evolving (see "Obtaining Criminal History" in Chapter 8, page 155).

If you have employees in San Francisco, review the requirements regarding San Francisco's Fair Chance Ordinance (see "San Francisco's Fair Chance Ordinance" in Chapter 8, page 158), which regulates any inquiry regarding criminal history and prohibits criminal history inquiries during the initial application process. Separate applications for San Francisco employers are available.

Employment Application for San Francisco Employers – Long Form
Employment Application for San Francisco Employers – Long Form (Spanish)
Employment Application for San Francisco Employers – Short Form
Employment Application for San Francisco Employers – Short Form (Spanish)

Excluding Questions Regarding Social Media Accounts

Employers are prohibited from requiring or requesting applicants to disclose information regarding their personal social media accounts. Specifically, employers are prohibited from requiring or requesting an applicant to:[5]

- Disclose a username or password for the purpose of accessing the applicant's personal social media
- Access personal social media in the presence of the employer
- Divulge any personal social media

Social media accounts can include Facebook, LinkedIn or Twitter accounts, for example. Social media accounts are defined by the law as "an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or account, or Internet Web site profiles or locations."[6]

These same prohibitions also apply to current employees. If you are interviewing to promote a current employee to an open position, you cannot request or require the disclosure of username or password to access the employee's personal social media. There is an exception for investigations and employer-issued electronic devices.

This law and how it applies to current employees is discussed in greater detail in "Using Social Media in the Workplace" in Chapter 8, page 164.

Employers cannot retaliate against, discipline, discharge or threaten to discharge an applicant or employee for not complying with an employer's request or demand to reveal personal social media information in violation of this law.

Application Provisions That Protect You

The sample applications that come with this ***Digest*** contain several damage control provisions. For maximum legal protection, when you hire a candidate, each of these provisions should become part of independent agreements between you and your new employee.

The sample applications include the following important provisions:

- An *authorization to check all references* listed by the applicant. Because you can be liable for negligent hiring if you fail to check an applicant's references, this damage control provision will help protect you from a claim that the applicant's privacy was invaded when you do check references. It will also be easier to gain information from former employers if they are aware that their former employee has authorized disclosure to you. Be aware, however, that this release cannot protect you against claims of intentional misconduct or employment discrimination, such as deliberately asking a former employer for protected information, like medical history or marital status. Keep in mind, the employee's authorization for you to check references applies only to the employment application and cannot be used after hire.

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5. Lab. Code sec. 980
6. Lab. Code sec. 980(a)

- *A statement that all answers given by the applicant are true,* and any omissions or false information are grounds for rejection of the application or the employee's termination. Court decisions allow you to use false information on a job application as evidence in your defense against a wrongful termination lawsuit, even if you did not discover the information was false until after the employee left.
- An initial statement that any future *employment will be on an at-will basis.* This clause helps to preserve the presumption that employment is at-will, and states that any contrary representations must be contained in a signed agreement to become binding.

Have the applicant initial each of the provisions in the application separately in a space provided in the margin. By drawing attention to these important provisions, you will make it less likely that an applicant will later be able to successfully claim that he/she was not made aware of what he/she was signing. Though not foolproof, these provisions can keep you out of court or tip the balance of evidence in your favor.

See "Record Keeping" on page 36 for information on retaining applications.

Interviewing Candidates

Any question prohibited on a job application is prohibited in an interview. However, while an application is in writing and relatively easy to limit to acceptable questions, interviews are verbal and are often quite different from one another. As one question leads to another during the course of the interview, it's not uncommon to inquire about subjects that are prohibited in the employment context.

Avoiding Overpromising in Interviews

You must train supervisors who participate in the interview process not to exaggerate the employment opportunity no matter how anxious they are to recruit the candidate. For example, in *Helmer v. Bingham Toyota Isuzu*, an interviewing supervisor created significant liability for his employer when he misrepresented that the candidate would earn substantially more than at the candidate's current job. The candidate accepted the new job, but was fired after several months of complaining that his earnings were lower than represented. Unable to return to his former job or find other work matching his former income, the disappointed employee sued and was awarded more than one million dollars. The court said that damages are recoverable against an employer who induces an candidate to leave secure employment by knowingly making false promises about the terms of his future employment.[7]

Conducting Consistent Interviews

To ensure that the interviews you conduct do not expose you to lawsuits, create a list of acceptable questions and stick to them. You can ask all of the questions on your list or only those you feel pertain to a particular job. Be sure all questions are strictly job-related, nondiscriminatory and not an invasion of the candidate's privacy.

Before the interview, review your entire list and clearly mark those questions you believe are most related to the position for which you are interviewing. Then, ask each candidate only those questions you have marked. If more than one person is interviewing candidates, be sure each interviewer has the same list of questions. Instruct each interviewer not to deviate from the selected questions.

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[7] *Helmer v. Bingham Toyota Isuzu*, 129 Cal. App. 4th 1121 (2005)

Asking Appropriate Questions

Do not ask questions about marital status or children. For example, you cannot ask a candidate if she is pregnant, has children or is planning to have children. If you know a candidate has children, you cannot ask if he/she has made provisions for child care. Similarly, if you would not ask a question of a man, do not ask it of a woman (for example, "If you became pregnant, how much time would you need away from work?").

Be careful when asking about hobbies or outside activities. It is discriminatory to ask about clubs, societies, lodges or organizations to which the candidate belongs that might indicate race, religion, national origin, sex, age, etc.

Become familiar with the Guide for Pre-Employment Inquiries, which outlines discriminatory and acceptable interview topics.

Don't ask which languages a candidate knows unless the job requires the candidate to speak and/or write a particular language fluently.

Rarely is it appropriate to ask a candidate's age. If required for the job, you can ask if the candidate is over a particular age (for example, a bartender or cocktail server).

Don't request or require the candidate to disclose his or her username or password for purposes of accessing the candidate's personal social media account(s). Don't ask the candidate to access their personal media account in front of you during the job interview or ask them to divulge any personal social media to you. The law prohibits you from requesting or requiring this information from applicants or employees.[8] For more information, see "Using Social Media in the Workplace" in Chapter 8, page 164.

Shelley v. Geren highlights the need for employers to avoid asking any questions that can be interpreted as discriminatory. Devon Shelley, a 54-year-old assistant chief of contracting with the Army Corps of Engineers (Corps), was seeking a promotion to the chief of contracting position. He was well qualified for the position with 29 years' experience in contracting. The five-member hiring panel selected a less-experienced, 42-year-old candidate, for the position.

During the recruitment process, two of the panel members inquired about the projected retirement dates for employees in the contracting division. After being passed over for the open position, Shelley sued the Corps for age discrimination. A lower court dismissed the case, but the Ninth Circuit found that there was sufficient evidence to permit the case to go to trial.

The Ninth Circuit considered as direct evidence of discriminatory bias the fact that two panel members requested the projected retirement dates. Especially important was the timing of the request, which was made during the recruitment process. The court found that a jury could "infer from [these facts] that they considered age and projected retirement relevant to the hiring decision."[9] For more information on this type of discrimination, see "Age" in Chapter 26, page 713.

There are a few exceptions to asking about age, which are noted in the *Guide for Pre-Employment Inquiries*.

Some questions about a candidate's education can be interpreted as seeking information on age. Though it is fine to ask where a candidate went to school, asking what year he/she graduated from high school or college, or inquiring if he/she is a "recent graduate" can be deemed discriminatory.

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[8] Lab. Code sec. 980

[9] *Shelley v. Geren*, 666 F.3d 599 (9th Cir. 2012)

Due to potential liability under the Americans with Disabilities Act (ADA) and FEHA, familiarize yourself with the basic requirements of those laws before conducting interviews. Though it may seem only natural to ask certain questions of a candidate whose physical disability is obvious to you, many of those questions may be strictly prohibited. For more information, see "Disability-Related Inquiries" in Chapter 28, page 863.

Developing Interview Questions

Never ask a job candidate any of the following questions:

- Are you a U.S. citizen?
- Is that a Jewish (or Chinese, Irish, French, etc.) name?
- In what country were you born?
- Do you have your own car?
- Do you have or plan to have children?
- What does your spouse do for a living?
- Are you married?
- Do you go to church?
- Are you single?
- Do you live alone?
- Do you have a disability that might interfere with this job?
- When did you graduate from high school?
- How many days were you sick last year?

You can ask the following questions:

- If you are hired, can you verify eligibility to work in the United States? If asking this question, ask all candidates, not just select candidates.
- Do you have transportation to get to work?
- Are you willing and able to travel?
- Can you work overtime if necessary?
- Why did you apply for this job?
- What do you consider the greatest accomplishment in your career?
- Is there anything that might make you leave this job?
- Why are you leaving your current job?
- What type of environment (i.e., individual, team) do you perform best in?
- What qualifications do you possess for this job?
- How has your prior experience helped you prepare for this job?
- Can you describe your relationship with your previous supervisor?

Taking Notes During an Interview

If you talk to a candidate at the time he/she gives you his/her completed application or during an interview, you may be tempted to write on the candidate's application and/or resume or in a separate notebook. Unless you take complete, legible notes that are not open to any misinterpretation and are in no way discriminatory, don't do it.

Upon close examination, notations taken during an interview can subject you to discrimination claims.

Consider the following real-life scenario: An employer made a notation on the application of a candidate for a position at the jewelry counter of a large department store. While he intended the notation to mean "no experience selling jewelry," the words "no jew" resulted in the candidate filing religious discrimination charges against the store.

If you are taking notes about the candidate's responses to questions, be sure that you are not using abbreviations or a coded rating system that could be incorrectly interpreted at a later date.

Keep objective records of why a candidate was or was not hired. For example:

- For an alarm installer: "Did not have experience with necessary equipment" rather than "not impressed."
- For a retail clothing store: "Unwilling to work weekends" rather than "wasn't right for the job."

Be sure your notes evaluate criteria actually necessary to perform the job. For instance, when interviewing for a telemarketer, your notes should reflect items such as "good interpersonal skills, types 75 wpm," rather than "handsome, blue suit."

Testing Candidates

You may want to administer a variety of tests to all or some job candidates. When you can administer tests varies based on the attribute being tested. You must also be concerned with the validity of the tests that you administer. The tests must be job related and accurate predictors of success in the job for which the candidate is being considered. Labor Code section 450 prohibits employers from charging candidates for any costs related to applying for a position. You must absorb the cost of all testing.

Employers may not implement tests that screen out or tend to screen out applicants with disabilities, unless the test is job-related and consistent with business necessity. Employers should also determine whether there is any alternative to a test that may discriminate against disabled applicants, or if such an alternative would impose an undue hardship on the employer.

Employers must reasonably accommodate disabled applicants during any testing process. Accommodations may include:

- Making testing sites accessible
- Using enlarged print, readers, or Braille for visually impaired candidates, or sign language interpreters for hearing impaired candidates
- Using writers or voice recognition software for applicants with spinal cord injuries
- Additional time to complete the test

For more information, see Chapter 28, "Disabilities in the Workplace," "Testing Applicants and Employees" in Chapter 8, page 148, "When Medical Exams and Inquiries are Permitted" in

Chapter 28, page 861, and "Applications and Job Tests for People With Disabilities" in Chapter 28, page 864.

Checking References

Though there isn't a specific law requiring that you check a candidate's references, courts have held employers liable for negligent hiring for certain acts of their employees, which the employer knew or should have known might occur. For example, by initially checking the references of an employee who later assaults someone in your workplace, you could have discovered that the employee had a record of similar assaults. For more information, see "Good Selection Practices" on page 34 and "Investigating Applicants" in Chapter 8, page 150.

Your actual ignorance of the employee's record is unlikely to be a good defense, because with a few telephone calls, you could have become aware of the previous assaults. Even if the candidate's former employer refuses to give you any information, documenting that you have attempted to check the candidate's prior work history can fulfill your obligation to avoid negligent hiring.

Use of credit agencies and investigative consumer reporting agencies to check the backgrounds of candidates and employees is regulated by both federal and state law. Use of credit reports is extremely limited. For details, see "Obtaining Applicant and Employee Credit Reports" in Chapter 8, page 150. For details regarding use of criminal records in the hiring process see "Obtaining Criminal History" in Chapter 8, page 155.

Employers are often tempted to investigate an applicant's online activities, including social media activity. For precautions, see "Using Social Media in the Workplace" in Chapter 8, page 164.

Obtaining Authorization

If you intend to check a candidate's references, you should require the candidate to sign a waiver authorizing you to investigate all information he/she submits on a job application. Employment applications should include a basic waiver, allowing you to check past employment, personal references and education. Obtain this authorization before you contact references.

The following sample employment applications contain such waivers.

Employment Application - Long Form

Employment Application - Short Form

Contacting References

When contacting references, provide the reference with a copy of the authorization obtained from the applicant.

Use the *Reference Check for Employment* to request reference information from a job candidate's prior employer(s).

Reference Check for Employment

When contacting references, you must gain the maximum amount of information on a candidate without creating liability for invasion of privacy. Stick to questions that are directly related to job performance.

Use the Guide for Pre-Employment Inquiries to determine if a question to a reference is acceptable.

Personal references generally are not helpful in the reference checking process, because they are often close friends of the candidate and therefore more than likely to give a biased report or private information not necessarily relevant to your inquiry. You can improve your chances of obtaining relevant information if you request personal references with knowledge of the candidate's work performance, such as past supervisors, subordinates or clients.

Good Selection Practices

Poor selection practices could potentially lead to claims of negligent hiring. There has been an increase in such claims. Examine your selection, evaluation, retention and training procedures, to exercise reasonable care in determining a candidate's fitness for employment and continuation of employment. At the same time, you must remain informed about federal, state and local discrimination laws, to understand which questions can or cannot legally be asked during an interview or on a job application.

Guide for Pre-Employment Inquiries

Reference checks are a part of good selection practices. Other types of background checks or pre-employment testing may also be necessary, depending on the position involved. For more information see, "Investigating Applicants" in Chapter 8, page 150.

Carefully review potential questions and consider the following to reduce liability for negligent hiring, retention and training:

- Identify potential liability factors such as high stress, handling negotiable instruments, driving vehicles, working with children and access to private property.
- Identify the traits related to the potential risk for each of those factors, such as poor driving records, criminal records or credit records (the use of which is extremely limited). See "Obtaining Applicant and Employee Credit Reports" in Chapter 8, page 150.
- Question the candidate about any gaps in employment. There may be a legitimate explanation, but the question is still valid.
- Contact each previous employer to verify not only dates of employment and positions held, but also information about the employee's reliability, tendency to engage in violent conduct, if any, and any instances of insubordination, dishonesty or other potential problems. Though many employers follow a policy limiting the amount of information given to prospective employers, carefully document the fact that you attempted to obtain the additional information but were unsuccessful, and document all information received from prior employers and references. For more information, see "Checking References" on page 33.
- Obtain a release protecting you and the people you contact about references from invasion of privacy or defamation claims.
- Limitations exist on the type of criminal background information that can be gathered and how information can be used. Be aware of restrictions on use of criminal history information. If a candidate has a criminal history, determine if the candidate's criminal background is related to the potential job. Analyze factors including the job and its duties; the timing, nature, number and circumstances of convictions; the relationship of the conviction to the job; and the candidate's employment background before and after the conviction. For more information, see "Obtaining Criminal History" in Chapter 8, page 155.

- Where necessary for the job, require applicants to provide certified copies of driver records, insurance, credentials, licenses, transcripts or other documents that you may require for employment.
- Revise employment applications to advise applicants that omissions, misrepresentations or falsifications of information will result in the applicant's rejection or the employee's termination.

Preventing Negligence in Hiring

As discussed in Chapter 8, "Personnel Records and Privacy," employees in California have a constitutional right to privacy. You are restricted in inquiries into many areas of the private lives of both employees and candidates, including some which have an impact upon the job. At the same time, employers are coming under increased scrutiny for negligently hiring and/or retaining employees whose criminal records, history of drug or alcohol abuse or related problems involve an unreasonable risk of harm to others. This scrutiny particularly pertains to employees whose work duties may affect the health and safety of both co-workers and the public, such as employees who deal regularly with customers in their homes or those operating motor vehicles.

Before an increase in negligent hiring and retention cases, under the doctrine of *respondeat superior,* employers generally were held liable only for negligent and intentional acts of employees done in the course and scope of employment when these acts injured others. Under *respondeat superior*, injured third parties generally could not recover damages against employers if the wrongful acts occurred outside the scope of the employee's employment or were not carrying out the employer's business.[10]

Under the negligent hiring and retention doctrine, however, injured third parties have, in certain situations, successfully sued employers for negligent hiring or retention of employees who engage in criminal or violent acts that occur after working hours or outside the scope of employment. Negligent hiring and retention enables plaintiffs to recover damages in situations in which the employer was previously protected from liability.

This doctrine also includes the duty to "exercise reasonable care for the safety of members of the general public," and provides that a person conducting an activity through employees or other agents is subject to liability "(a) for harm resulting in his conduct if he is negligent or reckless; and (b) in the employment of improper persons or instrumentalities in work involving risk or harm to others."[11]

Liability exists when an employer places a person with known tendencies, or tendencies that should have been discovered by a reasonable investigation, in a position where one should have foreseen that the person posed a threat of injury to others.[12]

For example, you can be found negligent in employing a person whose violent criminal background would have come to light in a routine reference check. Current law emphasizes the importance of a thorough investigation into an employee's background, especially in sensitive positions, positions of trust or positions with public contact.

If the employer knew, should have known of or failed to use reasonable care to discover the employee's unfitness for a position before hiring him/her, employers have generally been held liable.

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10. See e.g. *Farmers Insurance Group v. County of Santa Clara,* 11 Cal. 4th 992 (1995), for general discussion of respondeat superior doctrine
11. Restatement (Second) of Agency sec. 213 (1958)
12. See e.g. *Phillips v. TLC Plumbing, Inc.,*172 Cal. App. 4th 1133 (2009)

Plaintiffs have prevailed in situations where:

- A pastor sexually molested one of his adolescent parishioners, where there was evidence that he had sexually molested young males in the past.[13]
- A teacher, hired by a boarding school, kidnapped and assaulted several children. The teacher had admitted on his employment application that he had been arrested and charged with violating a public indecency statute and that he had a bench warrant outstanding against him. The school failed to investigate this incident and hired him anyway.[14]

Liabilities and Penalties

To recover damages for negligently hiring or retaining an employee who causes the plaintiff's injury, the plaintiff generally must establish all of the following:

- The existence of the employment relationship
- The incompetence of the employee who caused the specific negligent act on which the legal action is based
- Your actual or constructive knowledge of the employee's incompetence
- Your legal duty to select fit and competent employees
- That the employee's act or omission caused the plaintiff's injury
- That your negligence in hiring and/or retaining the employee resulted in harm to the third party

In addition, a plaintiff can recover punitive damages under the negligent hiring or retention doctrine if it is shown that you recklessly or intentionally hired or continued the employment of the employee who caused the injury. Under California law, a plaintiff must show that the employer engaged in one or more of the following:

- Had advance knowledge of the unfitness of the employee and employed the person with a conscious disregard of the rights or safety of others
- Authorized or ratified the wrongful conduct for which the damages are awarded
- An officer, director or managing agent of the corporation was personally guilty of repression, fraud or malice[15]

Record Keeping

This section discusses your obligation for retaining records related to recruiting and hiring.

Retaining Applications

Retention requirements vary according to different laws. A good rule of thumb is to keep all job applications of those who are not hired for at least three years. Keep applications from those who are hired for the duration of employment plus three years. If you face a claim or litigation involving the hiring practice, keep the application for the duration of the claim or litigation.

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[13] *Hughson v. United Methodist Church*, 8 Cal. App. 4th 828 (1992)

[14] *Bennett v. United States*, 803 F.2d 1502 (9th Cir. 1986)

[15] Civ. Code sec. 3294(b)

Records Retention Requirements

You are not required to keep unsolicited resumes or applications. Some employers send them back to the applicant along with a note explaining that there currently are no openings for the position sought. On the other hand, you can decide to keep unsolicited applications and resumes in a separate folder as a pool of candidates who wanted to work for you strongly enough to send resumes even though they did not know of a job opening.

Federal Contractors and Internet Applicants

Federal contractors have specific record-keeping requirements for Internet-based job applications. For more information, visit the Office of Federal Contract Compliance Programs' website at www.dol.gov/ofccp/.

Determining Starting Pay

When setting the initial pay rate for a new employee, keep legal and practical issues in mind. Legal considerations include complying with federal and state minimum wage and overtime laws, equal pay laws and avoidance of claims alleging unlawful discrimination in pay.

New 2016

For example, California enacted the Fair Pay Act, effective January 1, 2016, which enhanced existing protections against gender discrimination in compensation.[16] The law places specific requirements on employers to affirmatively show that any wage differential is not unlawful. For more information, see "Gender Wage Equality — Fair Pay Act" in Chapter 26, page 722.

Practical considerations include knowing what it takes to attract the candidate, how the proposed pay rate fits in to your compensation structure and what you can afford to pay.

In certain limited circumstances, you are allowed to pay less than the state minimum wage. For more information, see "Subminimum Wages" in Chapter 11, page 249. In other circumstances, you must pay more than the state minimum wage. For more information, see "Living Wage Versus Minimum Wage" in Chapter 11, page 247. For help determining the market rate for a wide range of job titles, adjusted for industry and geographic location, CalChamber members can visit one of CalChamber's partners, PayScale, at www.calchamber.com/payscale.

Offering Employment

Make sure that candidates understand who has the authority to make an offer of employment. Avoid misunderstandings about the job and conditions of employment by using offer letters.

During the hiring process, ask each interviewer to tell candidates how the organization makes offers of employment. If your organization uses offer letters, state that an offer letter is the only way to communicate an offer.

At a minimum, offer letters should contain the following information:

- Job title
- Exempt or nonexempt status
- Starting salary or wage

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[16] Lab. Code sec. 1197

- Work schedule
- Full-time or part-time classification for benefits
- Reporting date
- Any conditions to which the offer is subject, such as:
  - Post-offer medical exam
  - Post-offer drug test
  - Reference and/or background check
- A statement of the at-will basis of employment
- A deadline by which you expect an acceptance of the position by returning a signed copy of the offer letter

After you make an offer and the candidate gives notice, you can be held liable for losses suffered by the candidate should you subsequently withdraw the offer. Damages can include loss of earnings that would have been received at the candidate's previous job through retirement.[17]

Take care to prepare an accurate offer letter. You may be responsible for promises made about the scope, compensation, security and working conditions even though the employment relationship is on an at-will basis.[18]

In *Dore v. Arnold Worldwide, Inc.*, an incomplete description of at-will status in an offer letter resulted in litigation all the way to the California Supreme Court. The offer letter stated "As with all our company employees, your employment is at-will. This means that the company has the right to terminate your employment at any time just as you have the right to terminate your employment with the company at any time." The employee tried to convince the court that because the employer's definition failed to say he could be terminated for any reason, the employer had to prove just cause for termination. Although the employer ultimately prevailed in the litigation, it was an expensive error.[19]

You may want to prepare a separate letter for employees hired on a temporary basis that clearly describes the limited duration of their employment in terms of either a specific time or a specific assignment. Do not fail to include at-will language in this letter, or your description of the temporary assignment can be misunderstood to be a contract for a specified period of time or until the completion of the assignment.

Though not a requirement, you may want to send a letter to candidates who were not hired so they know they are no longer under consideration. Do not state a reason for passing them over or describe the qualities of the person selected.

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[17] [illegible] 124 Cal. App. 4th 685 (2004)

[18] [illegible] *Arthur Astor, et. al.*, 120 Cal. App. 4th 596 (2004)

[19] [illegible] 39 Cal. 4th 384 (2006)

New Employee Orientation

Every time a new employee begins work with your organization, follow a routine to familiarize the employee with your organization. Use the *Hiring Checklist* to assist you.

Most of the items on the checklist require little explanation. All of the following items are required for each new employee:

- *I-9 - Employment Eligibility Verification*
- *Rights to Workers' Compensation Benefits* pamphlet, which includes the:
  - *Personal Physician Designation Form*
  - *Personal Physician Designation Form - Spanish*
  - *Personal Chiropractor or Acupuncturist Designation Form*
  - *Personal Chiropractor or Acupuncturist Designation Form — Spanish*
- *DE 2515- State Disability Insurance Provisions* pamphlet
- *DE 2511 - Paid Family Leave* pamphlet
- *General Notice of COBRA Continuation Coverage Rights - California Employees* or *General Notice of COBRA Continuation Coverage Rights - Outside California*, for employees with organization-provided health plans
- *New Health Insurance Marketplace Coverage Options and Your Health Coverage* (required if covered by the FLSA / separate forms for employers who do/do not offer a health plan)
- *Sexual Harassment* pamphlet
- *W-4 - Employees Withholding Allowance Certificate* and *DE 4 - California Employees Withholding Certificate* (state tax withholding — not required unless the employee wants different withholding arrangements for state taxes)
- *Permit to Employ and Work - Form B1-4* (for minors)
- *Wage and Employment Notice to Employees* (Labor Code section 2810.5)

  You must provide nonexempt employees with specific wage information at the time of hire. See "Providing Wage Information Upon Hire" on page 41.

In some industries, such as health care, you must provide each new employee with a new employee orientation checklist.

Employee Orientation Checklist

Create and use a form to record initial employee training on matters such as:

- Safety training
- Policies and work rules
- Benefits availability and eligibility
- Emergency procedures
- Sexual harassment training
- At-will employment

- Confidentiality
- Internet, email and cell phone usage
- Receipt of employee handbook
- Employer property and equipment

Report New or Rehired Employees to EDD's New Employee Registry

Finally, federal law requires all employers to report information on newly hired or rehired employees who work in California to the EDD's New Employee Registry no later than 20 days after the start-of-work date. The start-of-work date is the first day services were performed for wages. All employees must be reported regardless of age or projected wages, even those who work less than a full day, are part-time employees, are seasonal employees or discontinue their employment before the 20th day of employment. A rehire occurs when the employment relationship ends and the returning individual is required to submit a *Form W-4*.

Employers must report the hiring of any employee who previously worked for the employer, but has not been employed for at least 60 consecutive days.[20]

W-4 - Employees Withholding Allowance Certificate

If you operate in multiple states, you can elect to report, via magnetic media, all newly hired employees to one state in which you have employees. If you choose to report via electronic or magnetic media, you must submit two monthly transmissions, not fewer than 12 nor more than 16 days apart.

You must report all of the following employee information to the EDD:

- First name, middle initial and last name
- SSN
- Home address
- Start of work date

Include the following information on your organization when you report employee information to the EDD:

- Business name and address
- California Employer Account Number
- Federal Employer Identification Number (FEIN)
- Contact person's name and telephone number

You can use any of the following to report information to the EDD:

- *New Employees Report - Form DE34*
- Copy of the employee(s) *W-4 - Employees Withholding Allowance Certificate*

  You must add the employee's start-of-work date, your California employer account number and Federal Employment Identification Number to the form.

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[20] UI Code sec. 1088.5 (b)

- Alternate equivalent form
- Magnetic media

New Employees Report - Form DE34

W-4 - Employees Withholding Allowance Certificate

You can print copies of *Form DE 34 - New Employees Report* from the EDD's website at www.edd.ca.gov, or call the EDD at (888) 745-3886. You must send your reports to:

Employment Development Department
Document Management Group, MIC 96
P.O. Box 997016
West Sacramento, CA 95799-7016
Fax: (916) 319-4400

Or contact the EDD e-Processing Unit at (916) 651-6945, or the new employee registry hot line at (916) 657-0529.

For information on reporting independent contractors to the EDD, see "Reporting Obligations and Independent Contractors" in Chapter 6, page 106.

Providing Wage Information Upon Hire

Nonexempt employees must be provided with specific wage information at the time of hire.[21] The Labor Commissioner has designed a template that complies with the specific requirements, which include:

- The rate(s) of pay and basis (hourly, by a shift, day, week, salary, piece, commission or otherwise), including applicable overtime rates
- Allowances, if any, claimed as part of minimum wage, including meal or lodging allowances
- The regular payday designated by the employer
- The name of the employer, including any "doing business as" names used
- The physical address of the employer's main office or principal place of business, and, if different, a mailing address
- The employer's phone number
- The name, address and phone number of the employer's workers' compensation carrier
- That an employee may accrue and use paid sick leave; has a right to request and use accrued paid sick leave; may not be terminated or retaliated against for using or requesting the use of paid sick leave; and has a right to file a complaint against an employer who retaliates
- Any other information the Labor Commissioner deems material and necessary

The information regarding paid sick leave is mandated by the Healthy Workplaces, Healthy Families Act of 2014, which requires paid sick leave benefits for California employees, effective July 1, 2015. For more information, see Chapter 20, "Paid Sick Leave."

Temporary service employers must also include the name, physical address of the main office, mailing address if different from the physical address of the main office, and the telephone number of the legal entity for whom the employee will perform work, as well as any other information the Labor Commissioner deems material and necessary. Security service companies are exempt from this requirement.

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[21] Lab. Code sec. 2810.5

Additionally, the employer must notify employees, in writing, of any changes to the information above, within seven calendar days after the time a change was made, unless:

- All changes are reflected on a timely wage statement (must meet all legal requirements)
- Notice is provided in another writing required by law within seven days of the change

You can find this form, known as the *Wage and Employment Notice to Employees (Labor Code section 2810.5)*, in your online formspack.

Wage and Employment Notice to Employees (Labor Code section 2810.5)

Wage and Employment Notice to Employees (Labor Code section 2810.5) - Spanish

Employees exempt from the payment of overtime wages by statute or Wage Order, employees of the state or any political subdivision (city, county, city and county or special district) and employees covered by a collective bargaining agreement are not covered by the written statement requirement.

Farm labor contractors must include the name and address of the legal entity that secured the services of the employer on the pay statement.

For information on a law that requires written commission agreements for commissioned employees, see "Written Commission Agreements" in Chapter 11, page 258.

Requesting a Driver's License

A general practice of requiring all new hires to show a driver's license can violate the law.

The Fair Employment and Housing Act (FEHA) prohibits an employer from requiring a person to present a driver's license, unless possessing a driver's license is:

- Required by law
- Required by the employer and the employer's requirement is otherwise permitted by law.[22]

In addition, employers cannot discriminate against undocumented persons who hold one of the unique California drivers' licenses issued under the Vehicle Code — often referred to as an AB 60 driver's license. The DMV began issuing these licenses in 2015. It is a violation of the Fair Employment and Housing Act and considered national origin discrimination to discriminate against an individual who possesses one of these unique driver's licenses.

An employer potentially exposes itself to liability for unfair immigration-related employment practices and national origin discrimination by asking a new hire for a driver's license when one is not required for the job. For more information, see "Immigrant Workers and Discrimination/Retaliation Protections" in Chapter 26, page 744. Moreover, unless driving is an essential function of a job, an employer who requires employees to provide a driver's license could also be violating state and federal disability discrimination laws.

On the other hand, an employer still has rights and obligations to verify eligibility for employment. Any action by an employer that is required by the federal Immigration and Nationality Act is not a violation of state law. This law does not prohibit an employer from reviewing documents that an employee chooses to present as part of the I-9 employment process. For more information, see "California Drivers' Licenses" in Chapter 5, page 79.

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[22] Veh. Code sec. 12801.9

Hiring Policies for Your Employee Handbook

When creating your employee handbook, consider including the following hiring-related topics.

The policies discussed below — along with many more — are available as part of CalChamber's ***Employee Handbook Creator***. Visit store.calchamber.com to find out more about how to easily create your employee handbook.

At-Will Statement

Your employee handbook should contain a statement of your at-will employment policy. For more information, see "At-Will Employment" in Chapter 29, page 887.

Acknowledgment and Receipt

A *Confirmation of Employee Handbook Receipt*, which employees must sign and return, records their receipt of, understanding of and agreement to abide by provisions of the handbook. Acknowledgment and receipt forms help establish that employees had notice of your policies, expectations and prohibitions. They are critical to defending against wrongful termination actions by demonstrating the employee's knowledge and acceptance of the at-will employment relationship.

Introductory Period

You can choose to have some type of introductory period during which employees are learning their job. The use of an introductory period does not mean that you can fire someone without good cause and expect that there will be no repercussions. Employees can still bring claims for discrimination and wrongful termination.

They may be able to collect unemployment insurance from your reserve account or that of a previous employer. The employee's eligibility for unemployment insurance benefits is determined by the Employment Development Department (EDD), based on your organization's reason for discharging the employee.

Remind new hires that you are an at-will employer, even if you do choose to use an introductory period. The introductory period does not mean that the new hire who completes this period of time is a permanent employee, nor does it mean that you will only terminate for cause.

If you choose to use an introductory period, define it in terms of calendar or working days.

You can choose to extend an introductory period. If you reserve that right, be sure to include it in your policy, as well as information on the impact of the extension on eligibility for any benefits.

The use of an introductory period does not permit you to terminate an employee for a discriminatory and/or illegal reason. Document the legitimate, nondiscriminatory reason for any termination.

Introductory Statement

An introduction describes the handbook's purpose, the employees to whom it applies, sources of additional information, a description of the employment at-will relationship and a statement that the policies in the handbook replace any previously existing policies and practices.

Job Duties

Your company's handbook should inform employees that job duties may change, by stating that:

- Employees may occasionally be asked to perform work on special assignments in addition to normal job duties
- Your company reserves the right to change job responsibilities, transfer job positions, or assign additional job duties at any time

Detailed job descriptions should be in a separate set of documents. The ADA requires that you make "reasonable accommodations" to enable a "disabled" employee to perform the essential functions of the job. Thus, your job descriptions should specify which duties are "essential functions" of the job and which duties are merely "marginal." Well-written job descriptions are a critical part of the "interactive process" necessary to an effective reasonable accommodation process.

Temporary Employment

No law defines temporary employment. Although a temporary employee may work full-time, arrangements should be for a fixed period. That fixed period should be outlined to the employee in advance. Employees cannot be classified as temporary indefinitely.

Verifying Social Security Numbers

The Social Security Administration (SSA) offers two methods to verify employees' SSNs. The Telephone Number Employer Verification (TNEV) is an automated telephone service that you can use to verify up to 10 employee names and SSNs at one time, without speaking to an agent. You can use this service only for wage reporting purposes.

The Social Security Number Verification Service (SSNVS) allows registered users, including employers and certain third-party submitters, to verify the names and SSNs of employees against SSA records.

With SSNVS, you can:

- Verify up to 10 names and SSNs online and receive immediate results. There is no limit to the number of times you can use the SSN Verification Web page within a session.
- Upload electronic files of up to 250,000 names and SSNs and usually receive results the next government business day.

Registration and use of the TNEV and SSNVS are free. You can register through the SSA's Business Services Online at www.socialsecurity.gov/bso/bsowelcome.htm.

Implement and use TNEV and SSNVS in a nondiscriminatory manner.

The SSA emphasizes that verifying SSNs can only occur after an employee has been hired and that the use of SSNVS/TNEV must be applied to employees consistently. You are not required to verify SSNs, but you may choose to do so. The TNEV and SSNVS systems cannot be used for employment verification purposes.

Under Labor Code section 1024.6, an employer may not discharge an employee or in any manner discriminate, retaliate, or take adverse action against an employee because the employee updates or attempts to update his or her personal information based on a lawful change of name, Social Security number or federal employment authorization document.

For instance, the Secretary of Homeland Security announced that certain people who came to the United States as children and meet several key guidelines may request consideration of deferred action for a period of two years, subject to renewal, and would then be eligible for work authorization. These individuals may attempt to update their Social Security numbers and may be protected under Labor Code section 1024.6, even if they were previously using false information.

In addition, for employers who use E-verify, you cannot take adverse action against employees when you receive notification of an E-verify mismatch (tentative non-confirmation letter or TNC) unless and until the program issues a Final Non-Confirmation. You must also provide specific notification to employees. For information on E-Verify, see "E-Verify" in Chapter 5, page 82.

Do not take any action against an employee who attempts to update his/her Social Security number without first consulting employment or immigration counsel.

For more information, see "Immigrant Workers and Discrimination/Retaliation Protections" in Chapter 26, page 744.

Training New Hires

The introductory period for any new employee is often challenging for both employee and supervisor. Often the attention given to the task of training at this time will set the employee on the road to success or allow the supervisor to identify and deal with bad hiring decisions. Do not refer to the introductory period of employment as a "probationary period," because the completion of a probationary period implies a commitment to employ the person as a permanent employee, which overrides the at-will nature of employment.

You may want to develop a training checklist that documents the essential job functions, found in your job description. Use the training checklist to record the date the new employee demonstrated competence in performing each function. This ensures that each employee is given the training necessary to be successful, and that every employee receives the same attention in training.

Conduct periodic training to ensure that the employee's skills are maintained. Document the content and identity of employees who participated in all training and education programs. Monitor employees and provide regular feedback about their on-the-job performance. When necessary, document incidents of the employee's inability to perform the job properly and effectively, and take corrective action.

Other required training will depend on the kind of employees you have and your specific type of business. For example, employees who handle and/or are exposed to blood may be required to have bloodborne pathogens training. Employees who drive forklifts are required to have annual training. If they are involved in an accident, they must have additional training. For additional information on safety training, see Chapter 23, "Ensuring Workplace Safety."

Mandatory Sexual Harassment Training

California law mandates that employers with 50 or more employees provide two hours of supervisor sexual harassment training. For more information on this requirement, see "Mandatory Supervisor Harassment Prevention Training" in Chapter 27, page 789.

Mandatory Heat Illness Training

Cal/OSHA regulations require outdoor employees to receive training on the risks and prevention of heat illness, including how to recognize symptoms and respond when they appear.[23] In addition to the training provided to all affected employees, supervisors must receive additional training. For more information on these training requirements, see "Avoiding Heat Illness" in Chapter 23, page 623.

Preventing Negligence in Training

Liability for negligent training can occur if you fail to train or improperly train an employee. Negligent training can include cases such as:

- Failing to provide an employee who is responsible for securing your facility or guarding the safety of your patrons with the proper training or education to perform the job safely and effectively.
- Failing to provide an employee who is responsible for using a dangerous tool or instrument with the knowledge or training necessary to perform the job safely.

Examples of Negligence in Training

The following situations are examples of cases in which plaintiffs have prevailed on the theory of negligent training:

- A woman was assaulted and raped in a parking garage. Testimony showed that if security agents hired to provide security for the parking garage had received proper training, the assault could have been prevented.[24]
- A 16-year-old employee of a rental car agency, driving a rental car without authorization, collided with another automobile, killing two of its occupants and seriously injuring two others. The rental franchise was found negligent in hiring youngsters as employees, failing to properly train them and leaving them unsupervised and in sole control of the premises.[25]
- Several plaintiffs were beaten and placed under arrest by police officers. The police department had a policy of issuing blackjacks without adequate supervision or training in the use of these weapons.[26]

Further Information

Helpful guidance on recruitment and hiring is available for supervisors in the CalChamber publication, ***HR Quick Guide for California Employers***, a product geared to beginners in the field of human resources. Visit store.calchamber.com for more information.

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[23] 8 CCR sec. 3395

[24] *Erickson v. Curtis Investment Co.*, 432 N.W.2d 199 (Minn. Ct. App. 1988), Aff'd 447 N.W.2d 165 (Minn. 1989)

[25] *O'Boyle v. Avis Rent A Car System, Inc.*, 435 N.Y.S.2d 296 (1981)

[26] *Hardeman v. Clark*, 593 F. Supp. 1285 (D.D.C. 1984)

Chapter 4

Exempt and Nonexempt

Federal and state laws exempt certain employees from wage and hour requirements, especially overtime pay and meal and rest break requirements. If you have a problem distinguishing between exempt and nonexempt employees in your company, you are not alone. Some of the largest multimillion-dollar awards of back pay by the courts stem from employers' misclassification of nonexempt employees as exempt from overtime.

The subject is particularly difficult for California employers, because the state's exemption requirements create more restrictions than federal law. As defined in the Industrial Welfare Commission (IWC) Wage Orders, California's requirements exceed even the federal standards adopted by the U.S. Department of Labor in 2004, making those federal standards generally irrelevant to California employees.

New 2016

However, in June of 2015, the Department of Labor (DOL) submitted proposed revisions to the federal overtime rules, including revising the federal minimum salary threshold. If finalized, these proposed rules could potentially impact California employers; the proposed federal overtime rules would contain a minimum salary threshold for exempt status that is higher than California's requirement. It is unlikely that any rules will be finalized before the Spring of 2016.

This chapter discusses the exempt and nonexempt classifications with particular reference to California standards for minimum salary and job responsibilities. It thoroughly explains requirements for each exempt classification.

Determining Exempt or Nonexempt Status

Because it is highly litigated, understanding the distinction between exempt and nonexempt employees is critical. Generally, exempt employees are your key personnel who possess management and decision-making responsibilities. Because of the complexity of this area of law and the potential for fines and awards of back overtime pay when an employee is misclassified, this ***Digest*** contains an extensive discussion of the subject. It also contains sample worksheets to assist you in determining an employee's status.

Exempt Analysis Worksheet - Administrative Exemption

Exempt Analysis Worksheet - Computer Professional Exemption

Exempt Analysis Worksheet - Executive Managerial Exemption

Exempt Analysis Worksheet - Professional Exemption

Exempt Analysis Worksheet - Salesperson Exemption

Always assume employees are nonexempt unless they clearly meet the job duties of an exempt position and will earn at least two times the current minimum wage on a monthly basis. If you are not experienced in determining exempt and nonexempt status, or if you are unsure about the status of a particular position, ask competent employment law counsel to review your determination.

An exempt employee is normally an executive, administrative or professional employee. Other exempt employee types include some inside and outside salespeople. All other employees generally fall under the nonexempt category. All nonexempt employees are covered by the state and federal wage and hour laws. To avoid paying overtime premiums, an employee must be exempt from the overtime requirements of both state and federal law.

You are not required by law to fill out and/or save exemption worksheets to determine if an employee should be classified as exempt or nonexempt. However, the worksheets offer an excellent way to define an employee's job duties and compare them to the criteria that must be met for an employee to be classified properly as exempt or nonexempt. Misclassification of a nonexempt employee as exempt could result in huge awards of back overtime payments, plus fines and legal expenses.

Use the *Exemption Worksheets* to help determine if the position you are filling should be classified as exempt or nonexempt. When determining if an employee's duties meet the requirements for an exemption, remember that an employee who does not perform exempt duties on a regular basis cannot be classified as exempt for a temporary assignment unless he/she meets the following criteria:

- Works the exempt job for at least one month
- Meets the duties and salary tests

You usually complete the worksheet based on the position's job description. However, consider asking the employees who fill the position to help you complete the worksheets. These employees can help determine the exact duties performed on a regular basis. They also know the amount of time they actually spend on various tasks, as this may differ greatly from time allocated for those tasks in a written job description. Keep completed exempt analysis worksheets in employees' personnel files or with other worksheets in a common file. You can use them for reference when hiring for similar positions.

You should make the determination as to the appropriate classification at the time of recruitment for the open position, and regularly audit to ensure that the position still meets any claimed exemption.

Making the determination at the time of recruitment is critical. For example, California law prohibits the use of a consumer credit report for employment purposes.[1] However, there is an exception if the position is managerial. A "managerial position" is defined as one that meets the test for the executive exemption under Wage Order 4. If you want to obtain and use a credit report for a managerial position, you must make sure that the position properly meets the test for the executive at the time of recruitment. For more information, see "Obtaining Applicant and Employee Credit Reports" in Chapter 8, page 150.

You can also use the worksheets periodically to reconsider the status of existing positions if the job content changes or the amount of time spent on exempt versus nonexempt duties changes.

Job Title Irrelevant to Employee Status

Job titles alone do not designate an employee as exempt or nonexempt. An employee with an impressive job title may not qualify as an exempt employee if his/her actual duties do not meet the exemption requirements. An employee who performs routine bookkeeping tasks does not become an exempt employee when given the title "controller" rather than "bookkeeper." Giving an employee the title of "store manager" does not make him/her exempt if he/she opens or closes the store alone, serves customers, maintains merchandise displays and performs the work of a retail clerk. Calling an employee a "computer systems analyst" or "software engineer" does not make that employee exempt unless the employee meets all the exemption tests. For more information on the exemption tests for computer professionals, see "Computer Professional Exemption" on page 64.

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[1] Lab. Code sec. 1024.5

Salary Requirements for Exempt Employees

Exempt employees generally must earn a minimum monthly salary of no less than two times the state minimum wage for full-time employment, and the salary must be a pre-determined sum. There are different rules for some employees, such as physicians, computer professionals and outside salespersons. However, placing an employee on a salary does not exempt that employee from wage and hour laws. A nonexempt employee placed on a "salary" earns overtime just as hourly wage earners do.

The following topics describe some of the more important issues you should consider regarding an exempt employee's salary.

Minimum Salary for Exempt Employees

New 2016

The minimum monthly salary for most exempt executive, administrative and professional employees is no less than two times the state minimum wage for full-time employment — $3,466.67 per month effective January 1, 2016. To calculate this amount, multiply the state minimum wage by the number of hours a full-time employee works in one year. Divide the result by 12 months.

The California minimum wage rate increased to $10.00 per hour effective January 1, 2016.

The minimum salary calculation is:

- California minimum wage = $10.00/hour
- Number of hours a full-time employee works in a week = 40
- Number of weeks in a year = 52
- Number of hours a full-time employee works in a year = 40 x 52 = 2,080
- Minimum annual salary for a full-time exempt employee beginning January 1, 2016 = $10.00 x 2 = $20 x 2,080 = $41,600
- Minimum monthly salary for a full-time exempt employee beginning January 1, 2016 = $41,600 ÷ 12 = $3,466.67

The exempt minimum salary requirement is based on the current state minimum wage, *not* any applicable local minimum wage.

Special minimums apply to certain physicians who are paid hourly and to computer professionals. For more information, see "Exemption for Physicians Paid on an Hourly Basis" on page 62 and "Computer Professional Exemption" on page 64.

Different rules also apply to outside and inside salespersons. For more information on these rules, see "Outside Salesperson Exemption" on page 65 and "Commissioned Inside Sales Employee Exemption" on page 66.

Salary is limited to cash wages. It cannot include payments "in kind," such as the value of meals and lodging.

Exempt Employees Receive Pre-determined Amount

The exempt employee must receive a pre-determined amount constituting all or part of his/her compensation for each pay period. The amount cannot be reduced because of variations in the number of hours worked or quality of the work performed. Again, this is the general rule for the executive, administrative and professional exemptions.

Employees compensated on an hourly basis generally do not meet the salary test required for exempt employees.[2] Exceptions exist for certain computer professionals and physicians paid on an hourly basis. For more information, see "Computer Professional Exemption" on page 64 and "Exemption for Physicians Paid on an Hourly Basis" on page 62.

In *Negri v. Koning & Associates*, a California court of appeal ruled that an insurance adjuster who was paid hourly and did not receive a pre-determined amount per pay period was not paid on a salary basis and was not exempt.[3]

A guaranteed minimum must be in place. A compensation scheme based solely on the number of hours worked without a guaranteed minimum is not a "salary" and does not qualify an employee as exempt. The court ruled that Negri was nonexempt and could proceed with his overtime claim.

Aside from the exceptions provided in this chapter, the employee must receive his/her full salary for any week in which he/she performs any work without regard to the number of days or hours worked. As a general rule, you need not pay an exempt employee for any workweek in which he/she performs no work.

Deductions from an exempt employee's salary are very limited. For more information, see "Deductions From an Exempt Employee's Salary" on page 68.

You may pay an exempt employee on an hourly basis for hours in excess of the standard 40-hour workweek, in addition to his/her regular salary. If the standard workweek in a particular industry is less than 40 hours, the Labor Commissioner allows an hourly rate for all hours beyond the industry standard. In addition, any hourly rate paid to otherwise exempt employees for work in excess of eight hours in any one day will not affect the exempt employee's status.[4]

Temporary Assignments and Employee Status

If an employee who is on a temporary assignment does not perform exempt duties on a regular basis, he/she is not exempt unless he/she works the exempt job and meets the duties and salary tests for at least one calendar month.

Federal Salary Basis Rules

Though the federal exemption regulations currently have no impact in California due to the state's more rigorous standards, the federal salary basis regulations[5] warrant some attention. The Division of Labor Standards Enforcement (DLSE) indicated that though differences do exist between the state and federal exemption standards, the federal regulations can serve as a guide where there is no conflict.[6] Also, an increasing number of class action lawsuits are now filed under the Fair Labor Standards Act (FLSA), alleging exemption violations.

The federal regulations include a safe harbor provision that provides some protection from liability under federal law. A state court could consider the provision if you are sued under state law. Under the safe harbor provision, an employer can avoid total loss of an exemption as a result of making improper deductions from salary if:

- The employer has a clearly communicated policy that prohibits improper deductions.
- The employer reimburses any adversely affected employees for losses resulting from deductions.

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[2] *DLSE Enforcement Policies and Interpretations Manual*, sec. 51.6.1

[3] *Negri v. Koning & Associates*, 216 Cal.App.4th 392 (2013)

[4] DLSE Opinion Letter 1997.09.03

[5] 29 CFR sec. 541.602

[6] DLSE *Enforcement Policies and Interpretations Manual* secs. 51.6.5, 51.6.6

- The employer ceases making prohibited deductions when learning that they were made.[7]

The *Federal Salary Basis Rules* form includes information on the "safe harbor provision" and the federal "salary basis."

Federal Salary Basis Rules

The DLSE *Enforcement Policies and Interpretations Manual* contains a compilation of the federal regulations. The entire series of 29 CFR sections 541.102 through 541.602 is included. Only parts of the regulations were adopted by the IWC for purposes of interpreting the administrative, executive (managerial) and professional exemptions. These can be referred to for guidance as long as there is no conflict with California law. However, note that this manual has not been updated since 2009.

New 2016

In June of 2015, the Department of Labor (DOL) submitted proposed revisions to the federal overtime rules, including revising the federal minimum salary threshold. If finalized, these proposed rules could potentially impact California employers; the proposed federal overtime rules would contain a minimum salary threshold for exempt status that is higher than California's requirement. It is unlikely that any rules will be finalized before the Spring of 2016.

Primarily Engages In Exempt Work

Most exemptions explained in this chapter require the employee to be "primarily engaged" in exempt duties. To determine if the employee primarily engages in exempt work, the Labor Commissioner examines the work that the employee performs during the workweek. The Labor Commissioner also considers the amount of time the employee spends on exempt work, as well as your realistic expectations and the realistic requirements of the job. In general, the employee must spend more than 50 percent of his/her time performing exempt duties.[8]

Exercise caution if you have managers that supervise employees and, at the same time, also perform routine nonexempt tasks, such as stocking shelves or managing the phone lines.

A California court ruled that a manager who performed various nonexempt duties (bagging groceries, cashiering, stocking) while simultaneously supervising staff was not primarily engaged in the performance of exempt work and was entitled to overtime.[9]

According to the court, when a supervisor is multi-tasking and engaging in the concurrent performance of both exempt and nonexempt duties, the employer should examine the supervisor's primary reason or purpose for undertaking the task in order to determine if the task is exempt or nonexempt — there are no "hybrid activities." The employer must determine if more than 50 percent of the time is spent on exempt tasks.

The court provided this guidance, quoting federal regulations: "If a task is performed because it is 'helpful in supervising the employees or contribute[s] to the smooth functioning of the department for which [the supervisors] are responsible' ... the work is exempt; if not, it is nonexempt."

Examples from the decision:

- Where the replenishing of stocks of merchandise on the sales floor is usually done by a nonexempt employee, the performance of this task by the manager or buyer of the department is nonexempt

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[7] 29 CFR sec. 541.603(d)

[8] DLSE *Enforcement Policies and Interpretations Manual* sec. 51.2

[9] *Heyen v. Safeway, Inc.*, 216 Cal.App.4th 795 (2013)

- A manager's participation in making sales to customers is nonexempt, unless the sales are made for "supervisory training or demonstration purposes"

For more information, see "Working Managers" on page 55.

Discretion and Independent Judgment

Most exemptions explained in this chapter require the employee to "customarily and regularly exercise discretion and independent judgment."[10] Discretion and independent judgment involves comparing and evaluating possible courses of conduct and acting or making a decision after considering various possibilities. An employee with discretion and independent judgment must either:

- Have the power to make independent choices pertaining to matters of significance and free from immediate supervision; or
- Have the ability to make a recommendation for action that is subject to a superior's final authority. The employee must possess sufficient authority for the recommendations to affect matters of consequence to the business or its customers.

To "customarily and regularly" exercise discretion and independent judgment is to use discretion and independent judgment frequently in the course of day-to-day activities. The phrase "customarily and regularly" signifies a frequency that is more than occasional but may be less than constant.

These types of activities do not involve exercising discretion and independent judgment:

- Applying knowledge to follow prescribed procedures
- Determining which procedures to follow
- Determining if specified standards are met
- Determining if an object falls into one or another grade or class

Inspectors and graders, for example, may have some leeway regarding the application of knowledge to a particular situation, but only within closely prescribed limits.

Almost every employee must make decisions requiring discretion. The discretion and independent judgment exemption requires that the decisions must involve matters of consequence of real and substantial significance to the policies or general operations of your business or customers. The tasks can be related directly to only a particular business segment, but must substantially affect the whole business.

Exercising discretion and independent judgment on matters of consequence is different than making decisions that can lead to serious loss through the choice of wrong techniques, improper application of skills, neglect or failure to follow instructions.

Employees in training for an exempt position are not exempt employees because they do not exercise discretion and independent judgment during the training process.

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[10] DLSE *Enforcement Policies and Interpretations Manual* sec. 51.5; 29 CFR 541.207

Executive Exemption

The executive exemption usually covers managerial employees. However, supervisors often do not meet the executive exemption and must be classified as nonexempt.

Executive Exemption Test

To determine if an employee is exempt, consider the duties he/she performs as well as salary. An executive employee is exempt from overtime pay if he/she meets *all of the following requirements:*[11]

- Has duties and responsibilities involving the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision;
- Customarily and regularly directs the work of two or more other employees;
- Has the authority to hire or fire other employees, make meaningful suggestions and recommendations relating to the hiring or firing and advancement and promotion or any other change of status of other employees;
- Customarily and regularly exercises discretionary powers;

  (For more information, see "Discretion and Independent Judgment" on page 52 and "'Customarily and Regularly Exercises Discretion and Independent Judgment' Defined for the Executive Exemption" on page 53)
- Is "primarily engaged" in duties that meet the tests explained in this section; and

  (For more information, see "'Primarily Engaged In' Defined for the Executive Exemption" on page 54)
- Earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment.

  For this purpose, full-time employment is defined as 40 hours per week.[12] For more information, see "Minimum Salary for Exempt Employees" on page 49.

All of these requirements must be met even if the employee is in "sole charge" of an establishment.

Exempt Analysis Worksheet - Executive Managerial Exemption

'Customarily and Regularly Exercises Discretion and Independent Judgment' Defined for the Executive Exemption

For the executive exemption to apply the employee must "customarily and regularly exercise discretion and independent judgment." This phrase means the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The employee must have the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.

With respect to the executive exemption, the most frequent cause of misapplication of the phrase "discretion and independent judgment" is the failure to distinguish discretion and independent judgment from the use of independent managerial skills. "An employee who merely applies his or her memory in following prescribed procedures or determining which required procedure out of the company manual to follow, is not exercising discretion and independent judgment."[13]

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[11] DLSE *Enforcement Policies and Interpretations Manual* sec. 53.6.2.1

[12] Lab. Code sec. 515(c)

'Primarily Engaged In' Defined for the Executive Exemption

For the purposes of the executive exemption, "primarily engaged in" means that more than one-half of the employee's work time is spent engaged in exempt work. An exempt employee must spend more than 50 percent of his/her time doing:

- Exempt duties
- Work that is directly and closely related to exempt work
- Work properly viewed as a means for carrying out exempt functions

Some examples of work that is directly and closely related to exempt work include:

- A manager prepares a management policy memo on his/her computer and emails it to another manager at a branch office. The typically nonexempt duties of typing and emailing would likely be considered exempt duties because they are directly and closely related to the exempt function of creating the policy and communicating it to another manager.
- During a busy time at a retail store, a customer knocks several glass jars off a shelf. Typically, a clerk would be assigned to clean up the mess. But, upon seeing all the clerks busy with other customers, a manager grabs a broom and sweeps away the mess so no one steps on broken glass and gets hurt. Although sweeping broken glass is typically a nonexempt duty, in this case it could be properly viewed as directly and closely related to carrying out the manager's exempt function of providing for the safety of the employees, customers and property.

Examples of Exempt Duties for an Executive

Exempt duties must be directly and closely related to managerial work, such as:

- Interviewing, selecting and training employees
- Setting, adjusting or recommending pay rates and work hours
- Directing work
- Keeping production records of subordinates for use in supervision
- Evaluating employees' efficiency and productivity
- Handling employees' complaints
- Disciplining employees
- Planning work
- Determining work
- Distributing work
- Deciding on types of merchandise, materials, supplies, machinery or tools
- Controlling flow and distribution of merchandise, materials and supplies
- Providing for the safety of employees and property

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[13] DLSE *Enforcement Policies and Interpretations Manual* s[illegible]

Examples of Nonexempt Duties for an Executive

Examples of nonexempt duties that a supervisor might perform include:

- Performing the same type of work as subordinates
- Performing any production work not part of a supervisory function, although not like the work performed by subordinate employees
- Making sales, replenishing stock or returning stock to shelves, except for supervisory training or demonstration
- Performing routine clerical duties such as bookkeeping, cashiering, billing, filing or operating business machines
- Checking and inspecting goods as a production operation rather than as a supervisory function
- Performing maintenance work

However, some otherwise nonexempt duties could be considered exempt if they relate directly and closely to exempt work and can be viewed as a means for carrying out exempt functions.

Working Managers

"Working manager" refers to an employee with managerial responsibilities and a managerial title who is primarily engaged in nonexempt duties, such as cooking, selling on the floor, cashiering, pumping gas, keeping records, taking care of patients or acting as a desk clerk. Working managers are often misclassified as exempt. Employers should closely analyze the actual job duties of such working managers to determine if they spend more than 50 percent of their time engaged in exempt activities.

Some examples of working managers that are often classified as exempt but may, in fact, be nonexempt include those in:

- Service stations
- Restaurants
- Rest homes
- Branch retail stores
- Motels

Assistant managers and trainees are usually nonexempt. They do not customarily and regularly direct the work of other employees; they share the responsibility instead. They focus on learning the position and do not perform the duties of the exempt position on a regular basis.

Apartment managers usually fall into the nonexempt classification. However, if the facility and staff are large enough, an apartment manager may meet the duties test for an exempt executive.

For more information, see "'Primarily Engaged In' Defined for the Executive Exemption" on page 54.

Supervising Two or More Employees

The IWC Orders require as a basic condition for the executive exemption that the manager must supervise two or more employees. This may be one full-time and two half-time employees. The Labor Commissioner cautions employers that, when reviewing classifications, it has been the Labor

Commissioner's experience that a managerial employee supervising as few as two employees rarely spends as much as 50 percent of his/her time primarily engaged in managerial duties.[14]

If an employee supervises only two or three other office employees, the main responsibilities and duties of the supervising employee are often directed toward performing office functions. Although these office functions may require more skill than those functions performed by subordinates, these functions may be routine office work or bookkeeping that is nonexempt work.

Administrative Exemption

The administrative exemption applies to a wide variety of employees. However, many employees whose jobs involve administrative work do not meet the administrative exemption test and must be classified as nonexempt.

Administrative Exemption Test

To determine if an employee is exempt, consider the duties he/she performs as well as salary. An administrative employee is exempt from overtime pay if the employee meets *all of the following requirements*:[15]

- Has duties and responsibilities involving one or both of the following;
  - Office or nonmanual work "directly related" to your management policies or general business operations or those of your customers
  - The administrative functions of a school system or educational establishment or one of its departments or subdivisions engaging in work directly related to its academic instruction or training
- Customarily and regularly exercises discretion and independent judgment (see "'Customarily and Regularly Exercises Discretion and Independent Judgment' Defined for the Administrative Exemption" on page 57);
- Regularly and directly assists a proprietor or an employee employed in an executive or administrative capacity; under only general supervision, performs work along specialized or technical lines requiring special training, experience or knowledge, or executes special assignments and tasks;
- Is primarily engaged in duties that meet the administrative test (see "'Primarily Engaged In' Defined for Administrative Exemption" on page 57 for more information); and
- Meets the salary test discussed in this section (see "Minimum Salary for Exempt Employees" on page 49 for more information).

Three types of administrative employees who may qualify for an exemption are:

- Executive or administrative assistants to whom executives or high-level administrators have delegated part of their discretionary powers
- Staff employees who are functional rather than department heads. This could include employees who act as advisory specialists to management, or to the employer's customers. Typical examples are tax experts, insurance experts, sales research experts, wage rate analysts, foreign exchange consultants, and statisticians. Such experts may or may not be exempt, depending on the extent

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[14] DLSE *Enforcement Policies and Interpretations Manual* sec. 53.4.1

[15] DLSE *Enforcement Policies and Interpretations Manual* sec. 52

to which they exercise discretionary powers. Also included in this category would be persons in charge of a functional department, which may even be a one-person department, such as credit managers, purchasing agents, buyers, personnel directors, safety directors, and labor relations directors.

- Employees who perform special assignments under only general supervision. Often, such employees perform their work away from the employer's place of business. Typical titles of such persons are buyers or field representatives.

'Directly Related' Duties Defined for Administrative Exemption

The California Supreme Court held that work duties qualify as administrative when "directly related" to management policies or general business operations.[16] Work is "directly related" if it meets two components:

- The work must be "qualitatively" administrative. "White-collar" employees engaged in servicing a business may be involved in administrative operations if such servicing includes advising management, planning, negotiating and representing the company. For instance, an insurance claims adjuster may meet this portion of the test if they perform activities, such as making recommendations regarding coverage and negotiating settlements.
- "Quantitatively," the work must be of substantial importance to the management or operations of the business.

Duties that are routine or unimportant would not be considered "directly related" to management policies or general business operations.

There is still some level of uncertainty as to how this portion of the test will be applied, and you should consult legal counsel if you are unsure whether your worker's job duties are truly administrative in nature. Remember that actual job duties, not the workers' job title, are key to the analysis.

'Primarily Engaged In' Defined for Administrative Exemption

For purposes of the administrative exemption, "primarily engaged in" means that more than one-half of the employee's work time is spent engaged in exempt work. This means an exempt employee spends more than 50 percent of his/her time performing:

- Exempt duties. For more information, see "Examples of Nonexempt Duties for an Administrator" on page 58.
- Work that is directly and closely related to exempt work.
- Work properly viewed as a means for carrying out exempt functions.

'Customarily and Regularly Exercises Discretion and Independent Judgment' Defined for the Administrative Exemption

For the administrative exemption to apply, the employee must "customarily and regularly exercise discretion and independent judgment." This phrase means the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The employee must have the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.

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[16] *Harris v. Superior Court*, 53 Cal. 4th 170 (2011)

The decision may be in the form of a recommendation for action, subject to a superior's final authority, but the employee must possess sufficient authority for the recommendations to affect matters of consequence to the business or its customers.

With respect to the administrative exemption, this phrase has been most frequently misunderstood and misapplied by employers and employees alike in cases involving the following:

- Confusion between the exercise of discretion and independent judgment, and the use of skill in applying techniques, procedures or specific standards.
- Misapplication of the phrase to employees making decisions relating to matters of little consequence.
- Misapplication of the exemption to employees engaged in production aspects of the employer's business as opposed to administrative functions. This is one of the most common misapplications.

Examples of Exempt Duties for an Administrator

Examples include:

- Advising management
- Planning
- Negotiating
- Representing the company
- Purchasing materials and supplies
- Promoting sales
- Researching business opportunities
- Analyzing business data
- Determining company and/or personnel policies

Executive or Administrative Assistants

Executive or administrative assistants to whom executives or high level administrators delegate part of their discretionary powers may possess enough authority to qualify for the administrative exemption. Generally, these assistants can be found in large establishments where executives or administrators possess duties of this scope and which require so much attention that the work of personal scrutiny, personal attention to correspondence and conducting personnel interviews must be delegated.[17]

Examples of Nonexempt Duties for an Administrator

Examples of nonexempt duties that an administrator might perform include:

- Performing routine clerical duties
- Making deliveries
- Operating equipment

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[17] DLSE *Enforcement Policies and Interpretations Manual* sec. 52.3

- Inspecting products
- Tabulating data

Challenge of Administrative Exemption

California court cases have confirmed how difficult it is for an employee to meet the administrative exemption. Employers who misclassify employees as exempt may owe the employees unpaid overtime, penalties for missed meal and rest breaks, interest and attorneys' fees.

Because employers do not track exempt employees' hours, a court will rely on the employee's evidence as to how many hours of overtime and missed meal and rest breaks are owed.

Even if an employee does not recoup a significant amount for overtime and meal and rest break violations, the employee may have incurred large attorneys' fees. The smaller recovery does not result in reduced attorneys' fees.[18]

Courts will focus on whether or not the employee in question is actually engaged in running your business or determining the overall course of its policies. Employees whose primary duties are not related to the company's day-to-day business, who do not participate in policy making or do not have any impact on the company's operation will not be eligible for the administrative exemption.[19]

For more information, review the *Exempt Analysis Worksheet - Administrative Exemption* and the *Job Description - Administrative Exemption*.

Exempt Analysis Worksheet - Administrative Exemption

Job Description - Administrative Exemption

Professional Exemption

Though an employee commonly may be considered a "professional," specific legal requirements must be met to qualify for the professional exemption.

The professional exemption extends to three categories of potentially exempt employees:

- Licensed
- Learned
- Artistic

An employee who is not a licensed professional could still be exempt if the employee qualifies as a learned or artistic professional. For more information, see "Unlicensed Professionals May Be Exempt as Learned Professionals" on page 61.

California's Wage Order 4, Professional, Technical, Clerical, Mechanical and Similar Occupations, classifies as nonexempt many occupations commonly considered artistic or learned professions, including artists, copy writers, editors, librarians, nurses, photographers, social workers, statisticians, teachers (other than state certified teachers), and many others. Unless an employee in one of these positions clearly meets one of the exemptions discussed in this chapter, based on the duties of the job, the employee must be classified as nonexempt.

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[18] *Eicher v. Advanced Business Integrators, Inc.*, 151 Cal. App. 4th 1363 (2007)

[19] *Combs v. Skyriver Communications, Inc.*, 159 Cal. App. 4th 1242 (2008)

Professional Exemption Test

A professional employee is exempt from overtime pay if the employee meets the following requirements.[20]

The employee must either be:

1. Licensed or certified by the State of California and primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching or accounting (for more information, see "Licensed Professionals" on page 61); or
2. Primarily engaged in an occupation commonly recognized as a learned or artistic profession. The "learned or artistic profession" exemption applies when an employee who is primarily engaged in work that either:
   - Requires advanced knowledge in a science or learning field customarily acquired by a prolonged course of specialized intellectual instruction and study, as opposed to a general academic education or an apprenticeship, and from training in the performance of routine mental, manual or physical processes or work that is an essential part of any of the above work; or
   - Is original and creative in character in a recognized field of artistic endeavor, as opposed to work that can be produced by a person endowed with general manual or intellectual ability and training, and the result of which depends primarily on the employee's invention, imagination or talent, or work that is an essential part of any of the above work; and
   - To qualify for the learned or artistic profession exemption, the work must be predominantly intellectual and varied in character, as opposed to routine mental, manual, mechanical or physical work, and the output produced or the result accomplished cannot be standardized in relation to a given period of time. For more information, see "Learned Professional Exemption" on page 61 and "Artistic Professional Exemption" on page 63.

To meet the test, the professional employee must also meet *all of the following requirements*:

- Customarily and regularly exercises discretion and independent judgment in the performance of the duties previously described (see "Discretion and Independent Judgment" on page 52 for more information); and
- Earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. For this purpose, full-time employment is defined as 40 hours per week[21] (see "Minimum Salary for Exempt Employees" on page 49 for more information).

You can find the current rate in the Exempt Analysis Worksheet - Professional Exemption.

There is an exception to the salary requirement for certain physicians who are paid at least an hourly rate set by the state. For more information, see "Exemption for Physicians Paid on an Hourly Basis" on page 62.

Private school teachers may be exempt under state law. For more information, see "Overtime for Private School Teachers" in Chapter 13, page 357.

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[20] DLSE *Enforcement Policies and Interpretations Manual* sec. 54.1

[21] Lab. Code sec. 515(c)

Licensed Professionals

The professional exemption for licensed professionals specifically applies to individuals with a license in one of eight enumerated professions:

- Law
- Medicine
- Dentistry
- Optometry
- Architecture
- Engineering
- Teaching
- Accounting

Unlicensed Professionals May Be Exempt as Learned Professionals

Some individuals practice in one of the eight enumerated professions, but are not licensed. For example, an accountant may not have a Certified Public Accountant license or a recent law school graduate may be waiting for results from the licensing exam. In the past, some treated these unlicensed professionals as ineligible for the professional exemption.

However, several courts have ruled that unlicensed accountants are not categorically ineligible for California's professional exemption. While the unlicensed accountants (and presumably other unlicensed professionals) do not qualify under the licensed professional category, they may be eligible under either California's learned professional exemption or administrative exemption.[22] These decisions mean that employers can potentially classify these employees as exempt.

A California court found that a law clerk who was enrolled in law school but had not yet passed the bar was exempt. The law clerk argued that he was not licensed during that period of time and thus could not meet the professional exemption test. The court, following earlier court rulings on unlicensed accountants, ruled that even though the law clerk did not have a license, he met the requirements of the learned professional exemption.[23] For more information, see "Learned Professional Exemption" on page 61.

Learned Professional Exemption

Some individuals are exempt because they work in a learned profession. To be exempt under the learned professional exemption, the employee must meet the professional exemption requirements. See "Professional Exemption Test" on page 60 for more information.

Key points to remember about this test and how it may apply to learned professionals are as follows:

- The educational requirement for the job is advanced. This is defined as a person who, to perform his/her job, completed a prolonged course of intellectual instruction in a recognized field of science or learning resulting in the attainment of an advanced degree or certificate. Knowledge of an advanced type must be knowledge which cannot be attained at the high school level. It is distinguished from a general academic education, apprenticeship, or training in routine mental, manual or physical processes. An example would be an advanced degree in a specialized field, such as a B.S. in Chemistry. Advanced and prolonged instruction in a specialized field must be established. While a degree above a B.S. or B.A. is not specifically required, some type of advanced degree or certificate is; the Labor Commissioner has indicated that it considers an advanced degree above a bachelor's degree as a standard prerequisite for claiming the exemption.

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[22] *Campbell v. PricewaterhouseCoopers LLP*, 642 F.3d 820 (9th Cir. 2011); *Soderstedt v. CBIZ Southern California LLC.*, 197 Cal.App.4th 133 (2011)

[23] *Zelasko v. Barrett v. Brayton-Purcell, LLP*, 198 Cal.App.4th 582 (2011)

- The work must be mainly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work).
- The product or result of the employee's work cannot be standardized with respect to time. The employee has considerable freedom of choice as to when and how to carry out a task. The individual generally controls his/her hours of work.
- The work is predominately (more than 50 percent of the time) intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work. Individual analysis of employee job duties is critical and the exemption cannot simply be applied to broad classes of professions.
- The employee must "customarily and regularly" exercise "discretion and independent judgment in the performance of his/her duties."[24]

Example: Professionals who might be exempt on this basis would be certain consulting or research chemists, physicists, biologists, geologists, etc., if their work and working conditions fit the criteria.

If these requirements are applied, the employee must still meet the discretion and independent judgment test and the employee must earn at least two times the minimum wage to be properly classified as exempt.

Certain unlicensed professionals, such as law clerks or unlicensed accountants, might meet the learned professional test. For more information, see "Unlicensed Professionals May Be Exempt as Learned Professionals" on page 61.

Exemption for Physicians Paid on an Hourly Basis

A licensed physician or surgeon primarily engaged in performing duties for which licensure is required is exempt from overtime if he/she is paid at least the minimum hourly rate set annually by the state.

New 2016

The minimum hourly rate of pay for 2016 increased to $76.24, effective January 1, 2016. The Director's Office of Policy, Research and Legislation (OPRL) is responsible for adjusting the rate every year, based on the percentage increase in the California Consumer Price Index (CCPI) for Urban Wage Earners and Clerical Workers. The 2016 rate changes reflect the 1.4 percent increase in the CCPI.

The exemption for physicians paid on an hourly basis does not apply to employees in medical internships or resident programs, physician employees covered by collective bargaining agreements or veterinarians.

Pharmacists Exemption

Pharmacists are not automatically considered exempt professionals. To be exempt, pharmacists must individually meet the administrative or executive exemption tests.[25] If they do not meet the administrative or executive exemption tests, they are nonexempt and are entitled to overtime, meal and break periods and all other wage and hour protections contained in the IWC Wage Orders.

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[24] DLSE *Enforcement Policies and Interpretations Manual* sec. 54.84

[25] DLSE *Enforcement Poli* [illegible] *retations Manual* sec. 54.10.8

Nurses Exemption

Registered nurses employed to engage in the practice of nursing do not meet the test for professional exemption unless they individually meet the criteria established for exemption as executive or administrative employees.[26]

However, certain advanced practice nurses are to be included in the professional exemption. Certified nurse midwives, certified nurse anesthetists and certified nurse practitioners may be exempt from overtime if they primarily engage in performing duties for which state certification is required. These employees must meet the other requirements established for the professional employee exemption, including the salary test and use of discretion and independent judgment.[27]

Artistic Professional Exemption

In California, relatively few individuals qualify for exemption as members of artistic professions. Most of those who exert sufficient control over the nature of their own work and over their work hours are self-employed in an artistic profession.

An individual involved in work that is creative must meet the requirements of the professional test to qualify for the artistic professional exemption. See “Professional Exemption Test” on page 60 for more information.

Key points to remember about this test and how it may apply to artistic professionals are as follows:

- The employee must be primarily engaged in the performance of work that is original and creative in character in a recognized field of artistic endeavor[28] (as opposed to work that can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends primarily on the employee’s invention, imagination or talent, or work that is an essential part of or necessarily incident to any of the above work.

  The term “recognized field of artistic endeavor” has been defined to include “such fields as music, writing, the theater, and the plastic and graphic arts;” and
- The work must be predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work).
- The employee must customarily and regularly exercise discretion and independent judgment in the performance of duties.
- The employee must earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment.

Academic degrees are not required, but a specialized course of study of at least four years is generally one element involved in establishing a professional standing in the fine arts. This element of study by itself is not enough. Composers or vocal instrumental soloists may be exempt because of their wide-ranging discretionary powers, including control over their working conditions. However, members of an orchestra may not be exempt employees.

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[26] Lab. Code sec. 515(f)(1)

[27] Lab. Code sec. 515(f)(2)

[28] DLSE *Enforcement Policies and Interpretations Manual* secs. 54.10.1, 54.10.2

Some writers employed in the motion picture or broadcast industries possess sufficient discretionary powers to be exempt. Most do not, even when working at home, because of time limits, restricting outlines or other constraints on the creative aspects of their work.

Computer Professional Exemption

An employee is an exempt computer professional if he/she meets all of the following requirements:

- Is primarily engaged in work that is intellectual or creative
- Is primarily engaged in work that requires the exercise of discretion and independent judgment
- Is primarily engaged in duties that consist of one or more of the following:
  - Applying systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications
  - Designing, developing, documenting, analyzing, creating, testing or modifying computer systems or programs, including prototypes, based on and related to user or system design specifications
  - Documenting, testing, creating or modifying computer programs related to the design of software or hardware for computer operating systems
- Is highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming and software engineering
- The employee's hourly rate of pay is not less than that set by law. If the employee is paid on a salaried basis, the employee earns an annual salary for full-time employment, which is paid at least once a month and in a monthly amount of not less than the rate set by law.[29]

New 2016

The hourly rate for the computer professional exemption increased for 2016 to $41.85 per hour, effective January 1, 2016. The minimum monthly salary exemption is $7,265.43, and the minimum annual salary exemption is $87,185.14. The OPRL reviews the rates annually and makes adjustments based on the California Consumer Price Index (CCPI) for Urban Wage Earners and Clerical Workers. The 2016 rate changes reflect the 1.4 percent increase in the CCPI.

An employee who does not meet all of the above requirements may still meet the tests for one of the other exemptions, such as the administrative exemption or the professional exemption. For more information, see "Administrative Exemption" on page 56 and "Professional Exemption Test" on page 60

Computer professionals who meet the exemption tests are clearly exempt from overtime. It is unsettled, however, as to whether computer professionals are also exempt from other wage and hour requirements, such the provisions relating to meal and rest breaks.

If you intend to exempt computer professional employees from wage and hour requirements other than payment of overtime, consult legal counsel.

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[29] Lab. Code sec. 515.5(a)(4)

Computer Professional Exemption Does Not Apply to Certain Employees

An employee is not exempt as a computer professional if any of the following conditions apply:[30]

- The employee is a trainee or involved in an entry-level position and learning to become proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming and software engineering.
- The employee works in a computer-related occupation but has not attained the level of skill and expertise necessary to work independently and without close supervision.
- The employee engages in the operation of computers or in the manufacture, repair or maintenance of computer hardware and related equipment.
- The employee is an engineer, drafter, machinist or other professional whose work is highly dependent on or facilitated by the use of computers and computer software programs. The employee is also skilled in computer aided design software, including CAD/CAM, but is not in a computer systems analysis or programming occupation.
- The employee is a writer engaged in writing material, including box labels, product descriptions, documentation, promotional material, set up and installation instructions, and other similar written information either for print or for onscreen media, or who writes or provides content material intended to be read by customers, subscribers, or visitors to computer-related media such as the Internet or CD-ROMs.
- The employee creates imagery for effects used in the motion picture, television or theatrical industry.

No Degree or Licensing Requirement for Computer Professional Exemption

Although employees exempt as computer professionals may possess a bachelor's degree or higher, no particular academic degree is required for this exemption, nor are there any requirements for licensure or certification.

Outside Salesperson Exemption

Outside salespeople are exempt from overtime pay, minimum wage, and meal and rest breaks if they meet both of the following criteria:

- Are 18 years of age or older
- Customarily and regularly work more than 50 percent of his/her working time away from your place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities

Outside salespeople **do not need to** meet the minimum salary requirement that covers the executive, administrative and professional exemptions.

Unlike federal law, California law does not allow work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, to be considered exempt work. This distinction is particularly important for route salespeople and others who perform many functions other than sales during an average day, such as delivery, repair and maintenance.

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[30] DLSE *Enforcement Policies and Interpretations Manual* sec. 54.5

The California Supreme Court's decision in the case of *Ramirez v. Yosemite Water*[31] clarified that to be exempt, outside salespeople in California must spend at least 50 percent of their time performing exempt duties, which do not include work such as delivery, repair and maintenance. Work performed incidental to and in conjunction with the employee's outside sales is not considered exempt work in California and cannot exceed 50 percent of an employee's working time.

For Wage Order 16, On-site Occupations in Construction, Drilling, Logging and Mining Industries, the "outside salesperson" definition has been specifically narrowed to not include an employee who makes deliveries or service calls for the purpose of installing, replacing, repairing, removing, or servicing a product.

Exempt Analysis Worksheet - Salesperson Exemption

The salary deduction rules that apply to the executive, administrative and professional exemptions do not apply to an outside salesperson who is paid in whole or in part on salary.

Commissioned Inside Sales Employee Exemption

Wage Order 4, Professional, Technical, Clerical, Mechanical and Similar Occupations, and Wage Order 7, Mercantile Industry, contain exemptions for some commissioned sales employees. However, the exemption is from overtime, not from the other requirements of the wage orders — such as minimum wage, meal and rest breaks and tracking hours worked.

Generally, the exemption applies if:

- The employee earns more than 1.5 times the minimum wage; and
- More than half of the employee's compensation represents commission earnings.

This is a narrow exemption. Consult legal counsel with any questions regarding whether your inside sales employees meet the commission exemption.

Minimum Earnings Requirements

The California Supreme Court held that an employer satisfies the minimum earnings requirement for this exemption only if the employer actually pays the required minimum earnings of 1.5 times the minimum wage for the hours worked during each pay period. An employer may not allocate wages paid in one pay period to a prior pay period to cure a shortfall.[32]

The court adopted the Division of Labor Standards Enforcement's (DLSE) guidance on this issue, which provides that to meet the first prong of this exemption:

- The employee must earn more than 1.5 times the minimum wage for each hour worked during the pay period. This requirement must be met for each workweek in the salesperson's pay period, whether actual commissions or a guaranteed draw against commissions.
- The payment of the earnings of more than 1.5 times the minimum wage for each hour worked must be made in each pay period. Therefore, wages due for one period of payment cannot be deferred to meet the minimum wage for a later period.
- Compliance with the exemption is determined on a workweek basis. The minimum exemption compensation must be satisfied in each workweek and paid in each pay period.[33]

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[31] *Ramirez v. Yosemite Water*, 20 Cal. 4th 785 (1999)

[32] *Peabody v. Time Warner Cable, Inc.*, 59 Cal. 4th 662 (2014)

In this case, the facts showed that for one particular bi-weekly pay period, the employee received about $200 less per week than the amount needed to meet the minimum earnings requirement. The company, Time Warner, argued that it should be able to attribute approximately $2,000 in commission wages paid in the following month to the workweeks of the preceding month to make up earnings shortfall. The court held that this was not allowed.

The current minimum wage is $10 an hour. To qualify for this exemption, an individual would need to receive in each pay check more than $15.00 per hour worked during the applicable workweeks covered by that paycheck. If you pay commissions less than twice a month, make sure your base wages cover this test.

Commissions Requirements

The second prong of this exemption is met if commission wages represent more than 50 percent of the employee's overall compensation.

DLSE guidance (which is not binding on courts) states that:

- The earnings from commissions must be more than 50 percent of total earnings for each workweek. However, according to the DLSE, the actual determination of compliance can be deferred until the reconciliation date following the end of the second pay period.
- Overtime is due for any week in which the earnings from commissions are less than 50 percent of total earnings for the workweek.
- The California test as to whether or not a compensation plan meets the bona fide commission plan requirement looks at a period of time of at least one month.
- Commission earnings below, at or near the draw indicate that a commission plan is not bona fide. If the commission plan is invalid, overtime will be due for all weeks in which the exemption was claimed, but not met.[34]

For more information on valid commission plans and what type of compensation is defined as a "commission," see "Commissions" in Chapter 11, page 257.

Employers that believe they qualify for the state overtime exemption will still need to verify that they meet the exemption under the federal Fair Labor Standards Act (FSLA), which has different exemption requirements and also does not use the same definition of "commissions" that is used in federal law.

National Service Program Participant Exemption

Participants in national service programs, such as AmeriCorps, are exempted from state employment laws relating to wages, hours and working conditions. Nonprofits and other entities using the AmeriCorps volunteer services must inform participants of any overtime requirements prior to the beginning of service. They must offer participants the chance to opt out of the program. Participants cannot be discriminated against or be denied continued participation in the program for refusing to work overtime for a legitimate reason.[35]

Under federal law, participants in national service programs are considered volunteers and qualify as exempt from federal wage and hour laws.[36]

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[33] DLSE *Enforcement Policies and Interpretations Manual* sec. 50.6

[34] DLSE Enforcement Policies and Interpretations Manual sec. 50.6.1

[35] Lab. Code sec. 1171

[36] Federal National and Community Service Act of 1993

Deductions From an Exempt Employee's Salary

The "salary test" required to validate overtime exemptions provides that an employee must be paid a full weekly salary for any week in which any work is performed. There are certain limited deductions allowed. If an employee works any part of a day, he/she must also be paid in full; no salary deduction is allowed. However, deductions can be made from any vacation, PTO or sick leave balance for the hours not worked, as explained in the examples below.

An exempt employee's salary is subject to very limited deductions.

Impermissible Deductions From Salary

The following types of deductions *are not* permitted from an exempt employee's salary:

- **Quality or quantity of work** — Do not make deductions from an exempt employee's salary for variations in the quantity or quality of work performed.
- **Unavailability of work** — Do not make deductions when work is unavailable because of the operational requirements of the business, if exempt employees are ready, willing and able to work. For example, if July 4th falls on a Tuesday and the business shuts down for that day and the balance of the week, exempt employees who worked on Monday of that week are entitled to a full week's pay. If there is no work at all during the week, there is no obligation to pay.

  Employers should give reasonable advance notice of any shutdowns.
- **Disciplinary reasons** — Although federal regulations and court decisions permit deductions of less than a full week from exempt employees' salary for limited disciplinary reasons, the Labor Commissioner issued an Opinion Letter stating that deductions for disciplinary reasons are *not* allowed in California.[37]
- **Jury duty, witness duty or military duty** — California follows the federal law about deductions from the salary of an exempt employee who serves on jury duty, as a witness or is on military leave. Deductions cannot be made from an exempt employee's salary for periods of less than a full workweek. If the exempt employee doesn't perform any work within the week, you can deduct from his/her salary for the week.[38]

Limited Deductions From Salary

The deductions listed in this section *are* permitted from an exempt employee's salary:

Vacations, Personal Leave and Religious Observances

You can make deductions from an exempt employee's salary for absences of a full day or more for personal reasons, such as vacation, personal leave and religious holidays. However, treat the religious observances of all exempt employees alike.

You can also deduct vacation from an exempt employee's vacation or PTO accrual for a partial day absence. If the exempt employee is absent for a partial day and has no vacation or paid time off (PTO) available, the employee must be paid for a full day if he/she performs any work that day. For more information, see "Partial Day Vacations for Exempt Employees" in Chapter 21, page 559.

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[37] DLSE Opinion Letter 97.04.28

[38] DLSE *Enforcement Policies and Interpretations Manual* secs. 51.6.21, 51.6.21.1

Example: Jeff requests a vacation day but has no PTO available. You can dock the value of a day's pay for each full day with no work. Jeff's annual salary should be divided by 52 for the weekly amount then divided by the number of days usually worked in a week to determine the daily rate.

Example: Joe is an exempt employee at ABC Company. He plans on coming in after lunch on Monday to extend his vacation from the prior week. ABC Company is generally open from 8 a.m. until 6 p.m. Joe arrives at work at 2 p.m. ABC Company may deduct the time missed on Monday from Joe's accrued vacation benefit, provided he has the time available.

Example: Mary wants to leave work at 10 a.m. on Friday to participate in a golf tournament. Her normal office hours are from 9 a.m. to 5 p.m. She previously used up her vacation time and has only two hours accrued in her vacation bank. She must receive her full salary for the day because she worked for one hour. Even though she does not have enough time in her vacation bank to cover her absence, her employer cannot deduct from her salary for the time missed.

Voluntary Sickness or Disability Plans

If the organization maintains a voluntary bona fide sick leave plan, a corresponding deduction can be made from salary in certain situations. A "bona fide sick leave plan" is a plan, policy or practice that replaces compensation lost due to sickness or disability. This is separate from mandatory paid sick leave. A "bona fide sick leave plan" is one which does not create a vested benefit payable at termination. If a plan exists, you can make a deduction from an exempt employee's salary for a *full day of absence* before the exempt employee qualified for the sick or disability pay and after the employee exhausted benefits under the plan.

Partial day absences caused by sickness or injury can be charged to an exempt employee's sick pay bank, provided the employee has such sick pay available at the time of the absence.

In contrast to voluntary sick leave plans, California employers were required to begin providing mandatory paid sick leave benefits on July 1, 2015 (AB 1522/the Healthy Workplaces, Healthy Families Act). Exempt employees are entitled to paid sick days under this law. If the exempt employee needs to take time off for one of the eligible reasons under the Act, you cannot deny the exempt employee the right to use accrued mandatory leave, and must allow use of accrued paid time off for a covered absence. If an exempt employee takes a full or partial day absence under the mandatory paid sick leave law, it can be charged to the exempt employee's accrued mandatory paid sick time.

The mandatory paid sick leave law provides specific details regarding how to determine accrual for exempt employees and also has recordkeeping requirements. For more information, see Chapter 20, "Paid Sick Leave."

Initial or Final Weeks of Work

You can prorate an employee's salary in full-day increments for the initial and final weeks of work, paying the employee only for the days worked in the pay period. However, an employee is not on a salary basis within the meaning of the exemption if you employ him/her occasionally and pay him/her a proportionate part of the weekly salary when so employed. Under these circumstances, even the full weekly salary payments would not meet the requirement, because casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis.

Family and Medical Leave

Leave under the federal Family and Medical Leave Act (FMLA) and California Family Rights Act (CFRA) by an exempt employee will not affect the exempt employee's status. You can make deductions from the exempt employee's paid sick leave for hours taken as intermittent or reduced FMLA and CFRA leave without affecting the employee's exempt status.

Chapter 5

Verifying Eligibility to Work

This section explains how to comply with immigration and naturalization laws and how to avoid related liabilities, such as discrimination and harassment claims. Federal immigration and naturalization laws impose complex compliance requirements on every employer, regardless of size. These laws require you to institute procedures for verifying that an individual is authorized to work in the United States. They also establish civil and criminal penalties for knowingly hiring, referring, recruiting or retaining in employment unauthorized employees when they are identified.

Verifying Eligibility for Employment and Establishing Identity

The Immigration Reform and Control Act (IRCA) of 1986 imposes compliance obligations and responsibilities on every employer regardless of size. You must verify that an individual is authorized to be employed in the United States. You face civil and criminal penalties for knowingly hiring, referring, recruiting or continuing to employ individuals who are not authorized to work in the United States.

It is illegal for a person or other entity to hire, recruit or refer for employment (for a fee):

- An employee who is unauthorized to work in the US
- Any individual without complying with the IRCA employment verification procedures[1]

You must verify that every new hire is either a U.S. citizen or authorized to work in the United States within three business days of the employee's first day of work for pay. For example, if the employee starts work for pay on Monday, the employer must complete its portion of the I-9 form by Thursday, by examining documents that give evidence of identity and employment eligibility. The acceptable documentation is listed on the back of the *I-9 - Employment Eligibility Verification*, which you must complete for every employee.

I-9 - Employment Eligibility Verification

I-9 - Employment Eligibility Verification - Spanish

If you comply with the verification requirements when hiring an individual but later discover that the employee is not authorized to work in the United States, you cannot continue to employ that person. Similarly, it is unlawful to contract an undocumented worker for labor if you know that he/she is unauthorized to work in the United States.

You cannot require more or different identity and work authorization documents than specified by the United States Citizenship and Immigration Services (USCIS), formerly the Immigration and Naturalization Services (INS). You must honor documents that appear valid on their face.[2]

If an employee can produce the required verification of eligibility to work, it's illegal to discriminate against him/her on the basis of:

- National origin
- Citizenship status

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[1] IRCA sec. 101

[2] 8 U.S.C. 1324b(a)(6

- The verifying documents' expiration dates

California also protects workers against certain unfair immigration related practices. For more information, see "Unfair Immigration-Related Practices" in Chapter 26, page 747.

Form I-9 Exceptions

Form I-9 is not required for:

- Employees hired prior to November 6, 1986, and continuously employed by the same employer
- Casual employees performing irregular domestic service in a private home
- Independent contractors
- Workers provided by contract services, such as temporary agencies

It is illegal to contract for labor for which you know the worker is not authorized. Doing so may subject you to civil and criminal penalties.

Penalties and Fines for Failing to Comply with Worker Authorization Requirements

You may be subject to the following penalties and fines for failing to comply with worker authorization requirements:

- Failing to complete, retain or make the forms available for inspection carries a fine ranging from $110 to $1,100 per individual form.
- Knowingly hiring or retaining employees who are not authorized carries civil penalties ranging from $375 to $16,000 per violation, depending on whether it is a first or subsequent offense.
- Engaging in a pattern or practice of knowingly hiring or continuing to retain unauthorized employees carries criminal penalties as high as $3,000 per unauthorized employee and/or six months of imprisonment.

Penalties for Incorrect Completion of Form I-9

Compliance with *Form I-9* requirements is an essential business practice. For example, the Ninth Circuit Court of Appeals upheld $172,000 in fines against an employer who failed to correctly complete the *Form I-9*.[3] Employers are responsible for reviewing and ensuring the employee fully and properly completes Section 1 of the *Form I-9*. Employers are responsible for filling out Section 2, reviewing documents and signing the form. Failures can lead to fines.

Partially completing a *Form I-9* will not suffice. The form needs to be fully and accurately completed and merely copying documents will not act as a substitute. For more information, see "Completing the Form I-9" on page 73.

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[3] *Ketchikan Drywall Services, Inc. v. Immigration and Customs Enforcement*, 725 F.3d 1103 (9th Cir. 2013)

Completing the Form I-9

U.S. Citizenship and Immigration Services (USCIS) is responsible for issuing rules relating to the *Form I-9*. Employers should be careful to accurately complete the form.

Employers must only use the *Form I-9* (Rev. 03/08/13 N) — previous versions will not be accepted.

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2016

In November of 2015, the USCIS proposed changes to the *Form I-9*. According to USCIS, many of the proposed changes are intended to help reduce technical errors and help employers complete the form on their computer. These proposed changes are currently pending. At the time of publication, these proposed changes were currently pending.

For more information, visit the U.S. Citizenship and Immigration Services website at www.uscis.gov.

I-9 - Employment Eligibility Verification

I-9 - Employment Eligibility Verification - Spanish

Only employers and employees in Puerto Rico can fill out the Spanish version of *Form I-9*. Spanish-speaking employers and employees in the 50 states and other US territories can print the Spanish version of *Form I-9* for their reference, but must complete the form in English to meet employment eligibility verification requirements.

The final rule:

- Prohibits you from accepting expired documents
- Revises the list of acceptable documents by removing outdated documents and making technical amendments
- Adds documentation applicable to certain citizens of the Federated States of Micronesia and the Republic of the Marshall Islands

The final rule's revisions affect the lists of acceptable documents that employees must present to verify their identity and employment authorization:

- List A documents, which show identity and employment authorization
- List B documents, which show identity only
- List C documents, which show employment authorization only

Employee Completes Section 1

Ask the employee to complete Section 1 of the *Form I-9* by the end of his/her first day of work for pay. Employees may complete this section any time between accepting a job offer and the first day of work for pay.

You may not ask an individual to complete Section 1 before he or she has accepted a job offer. Do not include the Form 1-9 with the job application.

USCIS offers an optional *Form I-9 Employee Information Sheet* that employers can make available to new employees. The form is intended to respond to common questions and prepare new employees to fill in Section One of the *Form I-9*. The form is available in English and Spanish on USCIS' I-9 Central webpage at www.uscis.gov/i-9-central.

If the employee cannot complete this section without assistance or a translator, someone may assist the employee. The preparer or translator must read the form to the employee, assist him/her in completing Section 1 and ask the employee to sign or mark the form in the appropriate place. The preparer or translator must then complete the Preparer and/or Translator Certification block on the *Form I-9*. You are responsible for reviewing and ensuring that the employee fully and properly completed Section 1.

You cannot ask a potential employee to provide you with a specific document with his/her Social Security number on it. Doing so may constitute unlawful discrimination. For information on verifying Social Security numbers, please see "Verifying Social Security Numbers" in Chapter 3, page 44.

According to the instructions for Section 1 of the Form I-9, providing a Social Security number on a Form I-9 is voluntary, unless the employer participates in E-Verify. E-Verify requires a Social Security number. For more information on E-Verify, see "E Verify" on page 82.

Employer Completes Section 2

You must fill out Section 2 and examine evidence of identity and employment eligibility within three business days of the employee's first day of work for pay. If you hire a person for fewer than three business days, both sections 1 and 2 of the *Form I-9* must be fully completed by the end of the employee's first day of work for pay.

The employee must be allowed to choose which document he/she wants to present from the lists of acceptable documents detailed below. You must examine one document from List A OR a combination of one from List B and one from List C. You must examine the original document(s) the employee presents and then fully complete Section 2 of the *Form I-9*. Follow the specific instructions in Section 2 of the form. For more information, see "Validity of Documents" on page 77.

All documents used for *Form I-9* verification must be unexpired. The only exception is that an employee may present a certified copy of a birth certificate. Additionally, in some instances, a document that appears expired may be extended and acceptable to use, such as the following:

- Permanent Resident Cards (*Form I-551*), if they have been extended under limited circumstances
- Individuals under Temporary Protected Status can sometimes present employment authorization documents that contain an expiration date. But these individuals can continue to work after the expiration date if the Department of Homeland Security (DHS) temporarily extended the validity date of the employment authorization documents through a notice published in the Federal Register

According to the USCIS, employers may designate an authorized representative, including personnel officers, foremen, agents or notaries public, to fill out *Forms I-9* on behalf of their company. If you designate someone else to fill out a *Form I-9* on your behalf, he/she must carry out all responsibilities for completing and signing the *Form I-9*, Section 2. The employer is still liable for any violations in connection with the verification process.

If you have remote hires, you may use an authorized representative to complete the *Form I-9* process.

Remember that Section 2 requires the employer or authorized representative to physically examine, with the employee being physically present, each document presented to determine if it reasonably appears to be genuine.

Documents in Lists A, B and C

You will be presented with a variety of documents that prove both identity and employment authorization (List A), identity only (List B) or employment authorization only (List C). You must physically examine one document from List A **or** a combination of one document from List B **and** one document from List C.

List A (identity and employment authorization)

1. U.S. Passport or Passport Card
2. Permanent Resident Card or Alien Registration Receipt Card (*Form I-551*)
3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa (MRIV)
4. Employment Authorization Document (Card) that contains a photograph (*Form I-766*)
5. For a nonimmigrant alien authorized to work for a specific employer because of his or her status:

- Foreign passport; and
- Form *I-94* or Form *I-94A* that has the following:
  - The same name as the passport; and
  - An endorsement of the alien's nonimmigrant status, as long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form

6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with *Form I-94 - Arrival/Departure Record* or *Form I-94A - Arrival/Departure Record* indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI

List B (identity only)

For individuals 18 years of age or older:

1. Driver's license or ID card issued by a state or outlying possession of the United States, if it contains a photograph or information such as name, date of birth, gender, height, eye color and address
2. ID card issued by federal, state or local government agencies or entities, if it contains a photograph or information such as name, date of birth, gender, height, eye color and address
3. School ID card with a photograph
4. Voter's registration card
5. U.S. military card or draft record
6. Military dependent's ID card
7. U.S. Coast Guard Merchant Mariner Card

8. Native American tribal document
9. Driver's license issued by a Canadian government authority

For people under age 18 who are unable to present a document listed above:

1. School record or report card
2. Clinic, physician or hospital record
3. Day care or nursery school record

List C (employment authorization only)

1. A Social Security Account Number card, unless the card includes one of the following restrictions on its face (NOTE: A copy, such as a metal or plastic reproduction, is not acceptable):

   NOT VALID FOR EMPLOYMENT

   VALID FOR WORK ONLY WITH INS AUTHORIZATION

   VALID FOR WORK ONLY WITH DHS AUTHORIZATION
2. Certification of Birth Abroad issued by the U.S. Department of State (*Form FS-545*)
3. Certification of Report of Birth issued by the U.S. Department of State (*Form DS-1350*)
4. Original or certified copy of a birth certificate issued by a state, county, municipal authority or territory of the United States bearing an official seal.
5. Native American tribal document
6. U.S. Citizen Identification Card (*Form I-197*)
7. Identification Card for Use of Resident Citizen in the United States (*Form I-179*)
8. Employment authorization document issued by DHS

For information on California Driver's licenses and the Form I-9 process, see "California Drivers' Licenses" on page 79.

Receipts

Sometimes, an employee may need to present, in lieu of a List A, List B, or List C document, an acceptable receipt, valid for a short period of time, for completion of Section 2 or Section 3 (reverification) of *Form I-9*. There are only three types of acceptable receipts:

1. A receipt showing that the employee applied to replace a document that was lost, stolen or damaged. at the employee applied to replace a document that was lost, stolen or damaged. The employee must present the actual document within 90 days from the date of hire
2. The arrival portion of Form I-94/I-94A with a temporary I-551 stamp and a photograph of the individual. The employee must present the actual Permanent Resident Card (*Form I-551*) by the expiration date of the temporary I-551 stamp, or, if there is no expiration date, within one year from the date of issue

3. The departure portion of Form I-94/I-94A with a refugee admission stamp. The employee must present an unexpired Employment Authorization Document (*Form I-766*) or a combination of a List B document and an unrestricted Social Security card within 90 days

When the employee provides an acceptable receipt, the employer should:

1. Record the document title in Section 2 under the sections titled List A, List B or List C, as applicable

2. Write the word "receipt" and its document number in the "Document Number" field. Record the last day that the receipt is valid in the "Expiration Date" field

By the end of receipt validity period, the employer should:

1. Cross out the word "receipt" and any accompanying document number and expiration date

2. Record the number and other required document information from the actual document presented

3. Initial and date the change

Employers cannot accept a receipt for the application for an initial or renewal employment authorization but can accept a receipt for the application for replacement of a lost, stolen or damaged employment authorization document. Employers cannot accept receipts if employment will last less than three days.

Passport Cards

The Department of State issues passport cards, which can be used for employment verification as a List A document on the *Form I-9*. List A documents are those documents that employees present to prove both identity and work authorization when completing the *Form I-9*.

The passport card is more limited in its uses for international travel (for example, it cannot be used for international air travel), but it is a valid passport that attests to the bearer's U.S. citizenship and identity. Accordingly, employees can use a passport card for the *Form I-9* process. Employers participating in the E-Verify card program can also accept the passport card. The form is not filed, but must be available for inspection by authorized U.S. government officials, such as personnel from ICE and the Department of Labor.

Validity of Documents

According to the USCIS, you must accept any documents from the USCIS lists of acceptable documents (found on the last page of the *Form I-9*) as long as they:

- Are unexpired
- Reasonably appear on their face to be genuine
- Relate to the person presenting them

Documents you receive from an employee reasonably must appear to be genuine and related to the employee who presents them. If these criteria are met, you comply with the verification requirements for document examination. You are not required to further investigate these documents.

You are liable for accepting documents if you know or have reason to know that the documents are false. USCIS regulations define "knowing" as:

> *... including not only actual knowledge, but also constructive knowledge ... knowledge which may fairly be inferred through notice of certain facts and certain circumstances which would lead a person, through the exercise of reasonable care, to know about certain conditions.*

In summary, if you knew or should have known, because of the availability of certain information, that the employee held an unauthorized status and had no right to work, you will be held liable.

Employers can't specify which document(s) they will accept for verification, as long as they are on the lists of acceptable documents.

Employees may choose which document(s) they wish to present from the lists of acceptable documents.

Document Abuse

Unfair documentation practices during the *Form I-9* process (document abuse) is prohibited by the anti-discrimination protections of the Immigration and Nationality Act.

According to the USCIS *Handbook for Employers, Guidance for Completing the Form I-9 (M-2740)*, document abuse occurs when employers treat individuals differently on the basis of national origin or citizenship status in the *Form I-9* process. Document abuse can be broadly categorized into four types of conduct:

- Improperly requesting that employees produce more documents than are required by *Form I-9* to establish the employee's identity and employment authorization;
- Improperly requesting that employees present a particular document, such as a "green card," to establish identity and/or employment authorization;
- Improperly rejecting documents that reasonably appear to be genuine and to relate to the employee presenting them; and
- Improperly treating groups of applicants differently when completing *Form I-9*, such as requiring certain groups of employees who look or sound "foreign" to present particular documents the employer does not require other employees to present.

The Department of Justice has been increasing enforcement efforts to address immigration discrimination, including concerns of document abuse in the I-9 process. For more information see "Immigrant Workers and Discrimination/Retaliation Protections" in Chapter 26, page 744.

California also protects workers against "unfair immigration practices" that are taken in retaliation for exercising rights protected under the California Labor Code. Retaliation includes unfair documentation practices.[4] For more information see "Immigrant Workers and Discrimination/Retaliation Protections" in Chapter 26, page 744.

An "unfair immigration related practice" includes the following actions when taken for a retaliatory purpose:

- Requesting more or different documents than are required under federal immigration law, or refusing to honor documents tendered pursuant to federal law that, on their face, reasonably appear to be genuine.

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[4] Lab. Code sec. 1019

- Using the federal E-Verify system to check the employment authorization status of a person at a time or in a manner not required under federal law or not authorized under any memorandum of understanding governing the use of the federal E-Verify system.
- Threatening to file or the filing of a false police report.
- Threatening to contact or contacting immigration authorities.

In addition, California employers may not discharge an employee or in any manner discriminate, retaliate or take any adverse action against an employee because the employee updates or attempts to update his or her personal information based on a lawful change of name, Social Security number or federal employment authorization document.[5]

Workers in California are entitled to the protections of the California's Labor Code regardless of whether or not they are legally authorized to work in the United States. If you hire unauthorized employees, you must pay them and follow the state labor laws.

California Drivers' Licenses

The law requires the California Department of Motor Vehicles (DMV) to issue a driver's license to an undocumented person who can prove identity and California residency and meet all other licensing requirements, such as the written and behind-the-wheel exams. These are commonly referred to as "AB 60 licenses," after the legislation authorizing their issuance.[6] The card will have a notation stating that it is not acceptable for federal purposes.

The DMV must issue an original driver's license to a person who is unable to submit satisfactory proof that the applicant's presence in the United States is authorized under federal law if he/she:

- Meets all other qualifications for licensure
- Provides satisfactory proof to the DMV of his/her identity and California residency

The Vehicle Code states that this driver's license will bear a mark noting "DP" instead of "DL" and will also bear this notation: "This card is not acceptable for official federal purposes. This license is issued only as a license to drive a motor vehicle. It does not establish eligibility for employment, voter registration, or public benefits."[7]

The DMV issued regulations setting forth the documents a driver's license applicant will need to provide in order to prove identity and residence and obtain a license. Visit the DMV website at http://www.dmv.ca.gov for more information.

You may not discriminate against an individual because he/she holds or presents a license issued under AB 60. Both the Vehicle Code and the Government Code provide that it is a violation of the state's Fair Employment and Housing Act for an employer to discriminate against an individual because he/she has an AB 60 driver's license. In fact, it will be considered national origin discrimination under FEHA.[8] For more information see "Immigrant Workers and Discrimination/Retaliation Protections" in Chapter 26, page 744.

Further, an AB 60 license also cannot be used as a basis for an investigation, arrest, citation, or detention. This applies regardless of whether the matter is criminal or civil.[9]

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[5] Labor Code sec. 1024.6
[6] Vehicle Code sec. 12801.9
[7] Vehicle Code section 12801.9(d)
[8] Vehicle Code section 12801.9(h)(2); Government Code section 12926
[9] Vehicle Code sec. 12801.9(i)

For employers who hire commercial drivers, AB 60 states that its provisions do not authorize an individual to apply for, or be issued, a commercial driver's license without submitting his/her Social Security number with his/her application.

Use of California Driver's License for I-9 Purposes

A California' driver's license, including an AB 60 driver's license, are acceptable List B documents for showing identity only. For more information, see "Documents in Lists A, B and C" on page 75.

However, a driver's license (regular or AB 60 license) does not alone establish authorization to work;[10] it only establishes identity (List B). The worker must most present acceptable, unexpired documents for **both** List B identity **and** List C (employment authorization).

While you cannot discriminate against someone holding or presenting an AB 60 license, the law recognizes that employers have the right and obligation to obtain documentation evidencing identity and authorization for employment.[11] Actions taken by an employer that are required to comply with federal I-9 verification requirements under the Immigration and Nationality Act (INA) do not violate California law.

> A worker with an AB 60 license may have documents that he/she can use to verify eligibility for employment and complete the I-9 requirements. If the employee can provide appropriate documentation that verifies eligibility for employment, you cannot discriminate against the employee just because at some point he/she showed you an AB 60 license. Consult legal counsel with any questions.

New 2016

The USCIS released the following FAQ addressing the use of the California AB 60 license during the I-9 process:

> **Q:** I understand that some states, such as California, issue certain types of driver's licenses, driver authorization cards, or driver privilege cards to individuals who do not present evidence of lawful presence in the United States. If I recognize a driver's license or card presented to me for *Form I-9* List B purposes as this type of license or card, should I still accept it?
>
> **A:** Yes. *Form I-9* requirements do not distinguish between different types of driver's licenses or cards. If the license or card reasonably appears to be genuine and to relate to the individual, and otherwise meets *Form I-9* requirements (contains a photograph or identifying information such as name, date of birth, sex, height, color of eyes, and address), it should be accepted. If the employer accepts any document, including a state-issued license with a limiting notation, as a List B document, the employer must also examine a List C document establishing employment authorization.
>
> The fact that an employee presents or an employer accepts a List B identity document such as a driver's license or card that meets *Form I-9* requirements but is a license or card issued by a state that does not require evidence of lawful presence in the United States, does not, in and of itself, support a conclusion that the employer had actual or constructive knowledge (i.e. knew or should have known) that an employee is not employment authorized.
>
> Under DHS regulations (8 CFR 274a.1(l)), whether an employer is considered to have actual or constructive knowledge that an employee is not authorized to work is determined on a case-by-case basis and depends upon all of the facts and variables specific to the individual case.

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[10] Vehicle Code section 12801.9 (d)(2)

[11] Vehicle Code section 12801.9(h)(2)(B

> Under 8 CFR 274a.1(l), a knowing hire violation can include, in addition to actual knowledge of unlawful status, constructive knowledge that may be fairly inferred through notice of certain facts and circumstances, which would lead the employer through the exercise of reasonable care, to know about a certain condition. Knowledge that an employee is unauthorized may not be inferred from an employee's foreign appearance or accent.

Additional USCIS I-9 Questions and Answers, including more questions on proper documentation, are available at the USCIS website at http://www.uscis.gov/i-9-central/i-9-central-questions-answers.

Employers with questions regarding the impact of AB 60 on their workforce and I-9 compliance will want to consult an immigration and/or employment attorney.

Employers should also be aware that there are restrictions on the ability of an employer to require a person to present a California driver's license.[12] For more information see Chapter 3, "Recruiting and Hiring."

Compliance with these different laws can be challenging. There are unanswered questions regarding the implementation of AB 60 and any potential conflicts with federal law. There may also be legal challenges to AB 60 and any implementing regulations.

Regulations Authorizing Electronic *Form I-9*

Employers may complete, sign, scan and store the *Form I-9* electronically, if certain requirements are satisfied. The regulations specify the following:

- The *Form I-9* must be completed with three business days, not calendar days.
- Paper, electronic systems or a combination of both are permissible.
- You can change electronic storage systems if performance requirements contained in the regulations are satisfied.
- You must maintain an audit trail when the *Form I-9* is created, completed, updated, modified, altered or corrected. However, you need not record each time the form is electronically viewed.
- You can provide confirmation that the *Form I-9* was completed, but you are not required to do so unless requested by the employee.

Though the regulations allow you to choose between paper and electronic systems, employers should apply consistent policies and procedures to all employees to avoid claims of discrimination. Similarly, providing an electronic version of *Form I-9* does not eliminate your obligation to examine documentation the employee provides prior to completing the *Form I-9*.[13]

Whether filled out on paper or electronically, an employer representative must physically examine required identification and eligibility documentation.

Retaining *Form I-9* Records

You must retain *Form I-9* records for as long as the individual works for you. Once the individual's employment terminates, you must retain the form for at least three years from the date of hire or one year from the date of termination, whichever is longer.

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[12] Vehicle Code section 12801.9(h)(2)

[13] 8 CFR sec. 274 (a)

Keep the *I-9 - Employment Eligibility Verification* and supporting documents in a location separate from the employee's personnel file. One approach is to keep one set of binders of I-9s for all active employees and one set of binders for non-active employees.

You must make these documents available for USCIS inspection within three days of a request for lawful inspection. You face civil penalties for violating these record-keeping requirements, ranging from $110 to $1,100 for each infraction.

I-9 - Employment Eligibility Verification

I-9 - Employment Eligibility Verification - Spanish

Employer Resources for Completing *Form I-9*

USCIS publishes the *Handbook for Employers, Instructions for Completing the Form I-9 (M-274)* for employers to consult for additional information on completing the *Form I-9*. You can obtain a copy of the handbook by contacting your local USCIS office. To find your local office, visit www.uscis.gov or look for its listing in your local telephone directory under "Department of Homeland Security" in the US government listings. You can also download the handbook from the USCIS website at www.uscis.gov/files/form/m-274.pdf.

The USCIS Office of Special Counsel established a toll-free Employer Hotline at (800) 255-8155 to provide prerecorded information on complying with employment-related immigration laws. The hotline also features a fax on demand service that allows callers to enter their fax numbers and quickly receive government forms and other information on a variety of subjects. You can also contact the department in writing.

E-Verify

E-Verify compares information from the *I-9 - Employment Eligibility Verification* against federal government databases to verify employees' employment eligibility. E-Verify is a free, web-based system operated by the Department of Homeland Security and the Social Security Administration.

E-Verify is a voluntary program for most California employers. Except for certain federal contractors and subcontractors, California employers can choose if they want to use E-Verify. State agencies and cities or counties, including special districts, cannot require a private employer to use E-Verify, except when required by federal law or as a condition of receiving federal funds.[14]

In other states, the use of E-Verify may be mandatory. The U.S. Supreme Court ruled that states can require businesses to use the federal E-Verify program.[15]

Federal contractors and subcontractors are required to use the E-Verify system to confirm employees' abilities to work in the United States. This rule covers federal contractors and subcontractors whose contract includes the Federal Acquisition Regulation (FAR) E-Verify Clause.

Government contracts issued after September 8, 2009, include a clause requiring government contractors to use E-Verify. Contractors awarded contracts will be required to enroll in E-Verify within 30 days of the contract award date and must use E-Verify to confirm all new hires, whether they are employed on a federal contract or not. You must check existing employees directly working on federal contracts using E-Verify to confirm that they are legally authorized to work in the United States.

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[14] Lab Code Secs. 2811-2813

[15] *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011)

The E-Verify program includes U.S. passport photo matching. This enhancement of the program enables E-Verify to automatically check the validity and authenticity of all U.S. passports and passport cards used for employment verification by comparing the data to State Department records.

Information on E-Verify is available at the E-Verify website at www.uscis.gov/e-verify.

Unlawful Practices

New 2016

It is a violation of California law to use E-Verify in a time or a manner not required by federal law to check the employment authorization status of an existing employee or of an applicant who has not been offered employment. There is an exception if the action is required by federal law or to receive federal funds.[16]

Employers can still use E-Verify, in accordance with federal law, to check the employment authorization status of a person who has been offered employment — just not for existing employees and applicants that don't have an offer.

There is a $10,000 civil penalty for each violation of this state law, in addition to any other available remedies. Each unlawful use of E-Verify on an employee or applicant is a separate violation.

This law is intended to prevent discrimination against applicants or employees, not to sanction the potential hiring of unauthorized individuals.

Federal law already prohibits employers from pre-screening job applicants through E-Verify, or submitting existing employees' data to E-Verify. This is the same rule that applies to *Form I-9*. For more information, see “Completing the Form I-9” on page 73.

Employers who use E-Verify in an unauthorized manner may be violating federal and state laws.

Posting Requirement

Employers who participate in E-Verify must display required participation posters, available from the USCIS at http://www.uscis.gov/e-verify/publications/participation-posters/e-verify-participation-posters, at hiring sites in such a way that they are clearly visible to potential employees. The two required posters are the *E-Verify Participation Poster* and the *Right to Work Poster.*

These posters indicate that the employer participates in E-Verify and describe employees’ rights under the program. The posters must be displayed in both English and Spanish. Once an employer is enrolled in E-Verify and has completed the online tutorial, the employer will be prompted to print and post the English and Spanish notices. Employers can access the posters after logging in to E-Verify.

Tentative Nonconfirmation (TNC)

Generally, if the information submitted through E-verify matches federal government records, the employee receives an “Employment Authorized” response in E-Verify.

If the information does not match, the employee is given an opportunity to resolve the problem. You need to understand and follow the proper procedures in E-Verify, which are designed to ensure due process for employees.

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[16] Lab. Code sec. 2814

A Tentative Nonconfirmation (TNC) response may be sent to you when there is a mismatch between the E-Verify information and federal records. Both federal and state laws set forth specific procedures that employers must follow if they attempt to verify a person's eligibility through E-Verify and receive a TNC from DHS or the Social Security Administration.

Employers who receive a TNC should consult the information on the E-Verify website, http://uscis.gov/e-verify, regarding the specific procedures under federal law.

New 2016

California also imposes specific requirements for employers when a TNC is received.[17]

Under state law, if the employer receives a TNC issued by the Social Security Administration or the DHS which indicates that the submitted E-Verify information does not match federal records, the employer must:

- Provide an employee any TNC or any notification issued by the Social Security Administration or the United States Department of Homeland Security that contains information specific to the employee's E-Verify case. The notification shall be furnished as soon as practicable.
- Comply with the required employee notification procedures under any memorandum of understanding governing the use of the federal E-Verify system.

There is a $10,000 penalty for violation of this law.

In addition, you should direct the person to the new E-Verify fact sheet, *How to Correct Your Immigration Records after Resolving a Tentative Nonconfirmation in E-Verify*, available from the USCIS website at www.uscis.gov/node/46566. The fact sheet provides detailed instructions the person can follow to correct his/her immigration records, and is available in 18 languages.

Discovering an Unauthorized Worker

If you discover that an employee has been working without authorization, reverify work authorization by allowing the employee another opportunity to present acceptable documentation and complete a new *Form I-9*. If the employee is unable to produce acceptable documentation, you must terminate employment to avoid penalties for knowingly continuing to employ an unauthorized employee. Consult legal counsel with any questions.

If you discover that you employed an unauthorized worker, you still have to comply with all wage and hour laws for the time period of his/her employment. All California workers are protected by the Labor Code and other employment laws regardless of immigrant status. You may want to also consult with an immigration and/or employment attorney. For more information, see "Immigrant Workers and Discrimination/Retaliation Protections" in Chapter 26, page 744.

California employers cannot immediately terminate employees when their visas expire unless it is clear and undisputed that their status cannot be remedied. Individuals who have the opportunity to transfer their expired visas to some other form of legal work authorization should be given the opportunity to do so. In certain circumstances, a reasonable unpaid leave of absence may be required. An employee's immigrant status does not affect the California requirement that good cause employment terminations must be lawful.

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[17] Lab. Code sec. 2814

Reverifying Employment Eligibility

You must reverify employment eligibility when an employee's employment authorization documentation expires. You can also reverify employment authorization, in lieu of completing a new *Form I-9*, when an employee is rehired within three years of the date that the *Form I-9* was originally completed and the employee's work authorization or evidence of work authorization expires.

You must reverify employment authorization on Section 3 of the *Form I-9* or by completing a new *Form I-9* to be attached to the original *Form I-9*, no later than the expiration date of prior authorization. To reverify expired status (Section 1) and/or expired work authorization document(s) (Section 2), an employee can present any currently valid List A or List C document. Employers should not reverify List B documents.

Employees are not required to present, for reverification purposes, a new version of the same document that was previously presented to satisfy Section 2. Any document or combination of documents that would be acceptable to demonstrate work eligibility or authorization is acceptable. Receipts showing that the employee has applied for an extension of an expired employment authorization document are not acceptable.

The reverification requirement does not apply to the U.S. passport or green card (*Form I-551*) issued to lawful permanent residents. Temporary evidence of permanent resident status, in the form of an unexpired foreign passport containing a temporary I-551 Alien Documentation Identification and Telecommunication System (ADIT) stamp, is subject to the reverification requirement.

You may want to create a system that reminds you when an employee's authorization document will expire. Advance warning is important so the employee can apply for, and receive, replacement documents in time to maintain uninterrupted employment.

For instructions on the *Form I-9*, see "Completing the Form I-9" on page 73.

Acquiring a Business

If you acquire a business as a result of a corporate reorganization, merger or sale of stock or assets and you retain the predecessor's employees, you are not required to complete new *Form I-9*s for those employees. You can rely on the *Form I-9*s completed by the previous employer if the employees continue to be employed and they have a reasonable expectation of employment at all times. However, you will be held responsible if the predecessor's *Form I-9*s are deficient or defective. Therefore, review the predecessor's *Form I-9* file and procedures as part of your standard operating procedure.

Avoiding Discrimination and Retaliation

It is unlawful to discriminate against or harass employees because of their ethnic background or national origin, or to exclude applicants lawfully entitled to work in the United States for similar reasons. These prohibitions are contained in numerous overlapping statutes at the federal and state levels. The Immigration Reform and Control Act (IRCA) also discusses citizenship and discrimination requirements.

California has many protections for immigrant workers, making it unlawful to engage in "unfair immigration-related practices" against workers who exercise their rights under the Labor Code, such as complaining about minimum wage violations.[18] For more information, see "Immigrant Workers and Discrimination/Retaliation Protections" in Chapter 26, page 744.

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[18] Lab. Code sec. 1019

All California workers — regardless of whether they are authorized to work in the United States — are protected by state law regulating wages and working conditions.

Practical Considerations

Consider these tips from the USCIS on avoiding discrimination in the I-9 process. These tips can be found in the *USCIS Handbook for Employers, Guidance for Completing the Form I-9 (M-2740)*:

Do:

- Treat employees equally when recruiting and hiring and when verifying employment authorization and identity during the *Form I-9* process.
- Allow each employee to choose the documents that he/she will present from the list of acceptable *Form I-9* documents.

Don't:

- Set different employment eligibility verification standards or require that different documents be presented by employees because of their national origin and citizenship status. For example, you can't demand that non-U.S. citizens present DHS-issued documents.
- Request to see employment eligibility verification documents before hire and completion of a *Form I-9* because someone looks or sounds "foreign" or because someone states that he/she is not a U.S. citizen.
- Refuse to accept a document or refuse to hire an individual because a document has a future expiration date.
- Request that, during re-verification, an employee present a new unexpired *Employment Authorization Document (Form I-766)* if he/she presented one during initial verification. For re-verification, each employee must be free to choose to present any document either from List A or from List C.
- Limit jobs to U.S. citizens unless U.S. citizenship is required for the specific position by law; regulation; executive order; or federal, state or local government contract.

Further Information

You can find valuable information for employers at www.uscis.gov.

Alternative Employment and Independent Contractors

Established labor law provides few answers to the multitude of issues you face regarding variations of the traditional workforce, including telecommuters, contingent workers, independent contractors and interns. The courts are just beginning to grapple with liability issues created by workplace variations. Until the rules become established, you must educate yourself about the issues that are likely to arise in the evolving workplace so you can make informed decisions and implement sound policies.

The growing trend toward using less-traditional employer-employee relationships has led to questions about which entity will be liable when there is an employment violation. In recent years, workers and worker representatives have attempted to expand the traditional definitions of "employer" and "employee" to broaden the potential points of recovery for wage-and-hour and other employment law violations. This has lead to expanded liability concerns for those who outsource, use staffing agencies, subcontract for services or are franchisors. For instance, the National Labor Relations Board has recently taken an expansive view of who is a "joint employer" for purposes of unfair labor practice charges. Also, the California legislature has expanded wage-and-hour liability for employers that contract for labor.

Employers will want to work with legal counsel to implement effective strategies to address legal risk.

The distinction between direct employment and indirect employment (temporary workers, leased employees and independent contractors) is often blurred by the details of the arrangements and laws or court decisions designed to protect the interests of workers. This chapter explains how to make those distinctions and the implications of failing to do so.

This chapter also provides a discussion of the many issues you are likely to face when employing indirect employees. This chapter includes a comprehensive compilation of topics about telecommuting, such as supervision, computer issues, wage and hour issues, workers' compensation and safety and health concerns.

Health care staffing, benefits and union issues are also discussed.

Contingent Workers

The term "contingent workforce" refers to the nearly one-quarter of this country's workers who are part-time, temporary or seasonal, secured through temporary agencies, or under employee leasing arrangements.

Direct employees include temporary, seasonal and part-time employees. Non-direct employees include workers who are employed through temporary staffing agencies, leased employees, other contracted labor and independent contractors. The distinction between direct employment and non-direct employment is often blurred by the details of the arrangements and the laws or court decisions designed to protect the workers' interests. There has been a recent push to expand company liability for workers obtained through sources such as staffing companies.

Short-Term and Part-Time Employees

Short-term employees, such as temporary, seasonal and specialized employees, are employed for a limited period of time or an identified project. The law does not specify a duration of time after which a short-term employee becomes a regular employee.

Specialized employees are those who are brought in for a short time due to their expertise in a particular area. They may be hired on a short-term basis to handle a project outside the employer's normal realm, such as setting up a computer system or leading an employer's efforts to rezone a piece of property on which it wants to build a new plant.

Part-time employees are those who do not work enough hours to meet the employer's definition of full-time. There are generally no legal definitions of full-time or part-time, so you can set the threshold number of hours. For important exceptions, see "Full Time and Part Time" in Chapter 11, page 244, "Covered Employers" in Chapter 30, page 917 and "Employer Mandate" in Chapter 17, page 424.

Employees who job share voluntarily split the hours and duties of a single job, prorating its wages and benefits. Job sharing raises many of the same questions as part-time employment.

CalChamber's ***Employee Handbook Creator*** can help you easily create an employee handbook that contains a sample job sharing policy. Purchase at the ***CalChamber store***.

Short-term and part-time employment create a number of issues to consider before hiring these employees:

- Will the short-term or part-time employee work enough hours to be entitled to participate in your retirement plan?

  Consult with your retirement plan administrator to determine employee eligibility.

- Will the short-term or part-time employee count toward the threshold number of employees for purposes of the federal plant closing law — the Worker Adjustment and Retraining Notification Act (WARN) or its California equivalent?

  WARN counts short-term employees toward the threshold. California's WARN law covers employers of 75 or more people, which includes temporary and seasonal employees. California WARN also counts part-time employees for the threshold.

- In a union workplace, is a short-term or part-time employee within the scope of a collective bargaining unit? In a non-union workplace, could short-term employees cause or participate in organizational activity?

  Short-term employees may be included in a collective bargaining agreement. For more information, see "Unions and Contingent Workers" on page 96.

  Normally, part-time employees are included in a collective bargaining agreement.

- Can you provide different benefits to short-term, part-time and regular employees, or no benefits at all to short-term or part-time employees?

  You can provide different benefit levels to different employees if the benefit is not withheld on an illegal discriminatory basis. Differentiating between short-term or part-time and regular employees is not illegal discrimination. You must provide short-term or part-time employees only with the benefits required by law, such as workers' compensation coverage. However, if you provide a short-term employee with health benefits, he/she may be entitled to rights under COBRA. For more information, see "COBRA" in Chapter 17, page 445. Moreover, without careful planning, temporary employees may become eligible for employee benefits. For more information, see "Benefits and Contingent Workers" on page 95.

- Are short-term or part-time employees covered by the federal Affordable Care Act (ACA)?

  If employees work an average of 30 or more hours per week, yes, they are covered by the ACA. For more information, see "Employer Mandate" in Chapter 17, page 424.

- Though short-term and part-time employees are entitled to the protections of anti-discrimination laws, will they count toward the minimum employee threshold to determine if a particular anti-discrimination law applies to the employer?

  Some anti-discrimination laws, such as the Age Discrimination in Employment Act (ADEA), do not clearly define if a short-term employee is counted toward the threshold number. Conflicting answers on this and other laws have come from various courts and policy-making bodies, such as the EEOC.

  Some anti-discrimination laws, such as the Family and Medical Leave Act (FMLA), make clear that part-time employees count toward the threshold.

- If a full-time employee reduces his/her hours to part-time, does that create eligibility for continuing health benefits under COBRA or the California Continuation Benefits Replacement Act (Cal-COBRA)? For more information on COBRA and Cal-COBRA, see "COBRA" in Chapter 17, page 445 and "Cal-COBRA" in Chapter 17, page 460.

- Will an exempt employee who works only part-time meet the required salary threshold to remain exempt? For more information, see "Minimum Salary for Exempt Employees" in Chapter 4, page 49.

Leased Workers

Employee leasing is a contractual arrangement where a staffing agency or Professional Employer Organization (PEO) provides workers for a company. Employee leasing firms handle much of the responsibility that the law imposes on employers, such as payroll, allowing you to spend more time on business itself. But a company who leases employees can lose much of the control necessary to avoid employment-related litigation.

Courts have often found joint employer status between the leasing firm and the organization leasing an employee. Joint employment status eliminates the benefit of being relieved of employment law responsibilities, and creates liability, where often there is little control. For instance, if you lease an employee, you can be found jointly liable where the leasing organization did not adequately address the issue of sexual harassment by failing to provide an anti-harassment policy or inadequately responding to an allegation of harassment. You can also be found to be a joint employer, for purposes of union organization efforts and National Labor Relations Act (NLRA) protections, under a recent agency decision. For more information, see "Covered Employers" in Chapter 31, page 931.

There has been a trend towards significant expansion of when businesses will be found liable as joint-employers. If you contract for outside labor, it is a good practice to have those arrangements reviewed by counsel.

Liability for Employers That Contract for Labor

A sweeping California law increased liability for employers who contract for labor and services. The purpose of the law is to hold companies accountable for wage-and-hour violations when they use staffing agencies or other labor contractors to supply workers.

In brief, if a labor contractor fails to pay its workers properly or fails to provide workers' compensation coverage for those employees, the "client employer" can be held legally responsible and liable under Labor Code section 2810.3.

Employers should review existing or new labor contracts and seek advice of legal counsel.

Employers in specific industries (construction, farm, garment, janitorial, security guard, warehouse contractors) were already restricted from contracting for labor if the employer knew or should have known that the contract does not provide sufficient funds to allow the contractor to comply with all laws governing the labor or services to be provided.[1] For more information on contractor liability in these specific industries see "Requirements for Labor Contractors in Specific Industries" in Chapter 11, page 294.

But, the increased liability under Labor Code section 2810.3 extends liability to employers in nearly *all* industries and does not require that the employer had any prior knowledge about wage-and-hour violations or that the employer meets any joint-employer test.

The law provides that the "client employer shall share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that labor contractor" for both of the following:[2]

- The payment of wages.
- Failure to secure valid workers' compensation coverage.

New 2016

Effective January 1, 2016, a new law expands joint employer liability for violation of specified whistleblower protections in the Labor Code. For example, a client employer can now be held legally responsible when a labor contractor, such as a staffing agency, retaliates against workers for engaging in protected conduct such as complaining of a violation of state or federal law, complaining about workplace safety, or complaining that they are not being paid according to the state's wage and hour laws.[3] For more information, see "Whistleblower Protections" in Chapter 26, page 707.

Basically, if the labor contractor fails to pay its employees properly, fails to provider workers' compensation coverage for those employees, or retaliates against employees for "blowing the whistle" on violations of the law, the client employer will now be legally responsible.

A client employer can contract for indemnification from the labor contractor for the labor contractor's failure to pay wages or secure workers' compensation coverage. There is, however, one exception; client employers cannot shift any legal duties or liabilities under workplace safety laws to the labor contractor.

Additionally, a client employer or labor contractor must provide any state enforcement agency or department any information within its possession, custody or control to confirm compliance with applicable state laws.

Coverage and Exclusions

The law applies to any "client employer," which is defined as a business entity with 25 or more workers that obtains or is provided at least six workers to perform labor "within its usual course of business" from one labor contractor or various labor contractors. In other words, this law could apply to employers who use staffing agencies or other labor contractors to supply workers.

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[1] Lab. Code sec. 2810

[2] Lab. Code sec. 2810.3

[3] Lab. Code secs. 98.6, 1102.5, 6310

The following business entities are excluded from the definition of "client employer" or from the liability imposed under the provisions of this law, under the following conditions and contracts:

- Business entity with fewer than 25 workers (including those hired directly by the company and those obtained from, or provided by, any labor contractor);
- Business entity that has five or fewer workers from a labor contractor or various labor contractors at any given time;
- Motor carrier of property that contracts with or engages another motor carrier of property to provide transportation services;
- Employer that utilizes a third-party motor carrier of property with interstate or intrastate operating authority to ship or receive freight;
- Cable operators, telephone corporations and direct-to-home satellite providers that contract with a company to build, install, maintain or perform repair work, as long as the name of the contractor is visible on employee uniforms and vehicles;
- Motor club that contracts with third parties to provide motor club services, if the name of the contractor is visible on the contractor's vehicles; or
- The state or any political subdivision of the state.

The Labor Code was amended, effective January 1, 2016, to also exclude the following employers from liability:

- Employer that uses a third-party household goods carrier permitted by the Public Utilities Commission to move household goods;
- Permitted household goods carrier that contracts with or engages another household goods carrier to move household goods.

A "labor contractor" is an individual or entity that supplies workers to perform labor within the client employer's "usual course of business," which is defined as "the regular and customary work of a business, performed within or upon the premises or worksite of the client employer." In other words, this law only applies work done within the usual course of the client employee's business.

Example: A law firm contracts with a furniture repair company to come and fix a table in the conference room. The furniture repair company is not performing labor within the law firm's usual course of business, which is the practice of law, not furniture repair. Their contract to get the table fixed is not covered by this law.

Example: A 100-person law firm contracts with a staffing agency to provide 10 temporary paralegals for an upcoming trial. The paralegals are performing labor within the law firm's usual course of business and the contract would be covered by this law.

The following entities are specifically excluded from the definition of "labor contractor" and, therefore, the provisions of the law will not be triggered if they are the ones providing the labor to the client employer:

- A bona fide non-profit community based organization that provides services to workers;
- A bona fide labor organization or apprenticeship program or hiring hall operated pursuant to a collective bargaining agreement;
- A motion picture payroll services company; or
- A third party who is a party to an employee leasing arrangement if the employee leasing arrangement contractually obligates the client employer to assume all civil legal responsibility and civil liability under the law.

The new law specifically states that it does not impose liability on a business for using an independent contractor, other than a labor contractor. Nor does it change the definition of independent contractor. Employers should continue to make sure that any workers classified as independent contractors meet the test. For more information, see "Independent Contractors" in Chapter 6, page 96.

A "worker" does not include an employee who is properly classified as exempt from the payment of overtime pursuant to the administrative, executive or professional exemption in the California's Wage Orders. Therefore, if the contract is for employees that fall within any of these exemptions, the provisions of the law will not apply.

Administrative or Civil Actions

A worker who believes he/she has not been properly paid or who has suffered an injury and there is no workers' compensation policy can pursue an administrative claim or civil action against the client employer, labor contractor or both.

If the worker pursues a civil action, the employee or representative has to provide notice to the client employer of the alleged violation(s) 30 days before filing the civil action.

If the worker pursues an administrative claim, no prior notice to the client employer is required.

To prevail in an administrative or civil action against the client employer for the labor contractor's alleged violations, the worker will need to prove:

- That he/she was not properly compensated or provided with workers' compensation coverage;
- That these violations occurred while the worker was working pursuant to a contract for labor between the client employer and labor contractor; and
- The contract was for work within the "usual course of business" of the client employer, meaning the work was regular and customary for the client employer and performed within or upon the premises of the worksite of the client employer.

Best Practices for Employers Who Contract for Labor

Employers that use staffing agencies should be cautious and evaluate the agency in advance to determine if the contractor complies with California's labor laws. Employers may want to involve legal counsel, human resources, and payroll in this evaluation.

Any entity that falls within the definition of "client employer" may want to contact legal counsel to determine what efforts may be made to limit the exposure of liability for a contractor's wage-and-hour violations, failure to secure workers' compensation coverage or violations of whistleblower protections.

Additionally, employers may wish to consider the following tips:

- Review all existing contracts for labor or services to determine what contracts may fall within the scope of "usual course of business." For those contracts that qualify, contact those contractors to obtain assurances of their labor and employment compliance.
- Consider including legal protections for wage-and-hour violations, workers' compensation coverage and claims involving retaliation for protected conduct — including duty to defend and/or indemnification provisions, in new and existing contracts.
- Limit reliance and use on contracted labor or services and determine internally where efficiencies can be made with regard to workload or hiring of additional employees.

Practical Considerations When Leasing Employees

Some general issues to consider when deciding whether to lease employees and from whom to lease them:

- Is the leasing company well-versed in payroll, employment practices and personnel record keeping requirements under California and federal law? Do they comply with California's wage-and-hour laws? Do they comply with California's laws providing whistleblower protections? Are they properly paying all required wages?

  Request a sample personnel file and a description of the leasing organization's payroll process. Ask your counsel to review this information to ensure it meets legal requirements. For more information, see "Final Pay for Temporary Employees" in Chapter 29, page 903.

- How does the leasing organization screen applicants during the hiring process?

  You can be responsible for negligent hiring if the leasing organization fails to properly screen applicants before hiring them. Inquire as to how thoroughly the leasing organization checks references and what type of background checks are available.

- Does the leasing organization provide and administer employee benefits for the leased employees?

  Consider how the leasing organization's benefits compare with those provided to your regular employees to avoid the morale problems that could be created if there is great disparity between the two. On the other hand, leasing organizations can self-insure or be entitled to low group rate premiums, meaning lower costs for providing benefits.

- What type of indemnification is provided for liability arising from the violation of employment laws?

  Request proof of bonding or insurance and written assurance of indemnification, then review the leasing organization's assets to ensure it is a solid organization and apt to remain in business. Consult legal counsel.

- Who will provide workers' compensation coverage for the leased employees?

  Confirm coverage if the leasing organization is securing the coverage.

- Who will be responsible for workplace safety issues, such as training?

  Existing case law indicates that you cannot divest yourself of your duties under the occupational safety and health laws.

- Will employees receive different pay for the same work depending on if you or the leasing organization employs them?

  This situation could violate California's Fair Pay Act, which prohibits gender discrimination in wage rates, and requires equal pay for substantially similar work when viewed as a composite of skill, effort and responsibility.

- Will the leased employees count toward the minimum employee threshold for the purpose of various employment laws?

  Leased employees may count toward these thresholds, especially if a joint employment relationship is found. You should seek legal advice on the question of whether any leased employees count toward a particular minimum employee threshold.

- What are the consequences if your current employees will be hired by a leasing organization and then leased back to you?

  Formally terminate your current employees, including all normal termination procedures, such as final wages, payment for accrued vacation and required notices. The leasing organization should then comply with all normal hiring procedures, including compliance with immigration laws, required notices and completion of withholding forms. Certain employee benefit rights, such as COBRA, could arise as a result of this practice. A court may also find this worker to be an "employee" of your company.

Contracting for Foreign Workers

Federal law permits certain foreign workers to engage in employment in the United States under specified conditions. State law regulates foreign labor contractors who recruit foreign workers for assignments in California, including regulation of contracts, recruitment procedures and representations, and information as to terms and conditions of employment.

The law provides restrictions for employers who use foreign labor contractors to obtain temporary foreign workers in California.[4] This law was intended to address human trafficking concerns.

A "foreign labor contractor" means a person who performs "labor contracting activity," which is "recruiting or soliciting for compensation a foreign worker who resides outside of the United States in furtherance of that worker's employment in California." It does not include the services of an employer if those services are solely to find workers for the employer's own use.

The law:

- Requires foreign labor contractors to register with the Labor Commissioner and meet registration, licensing and bonding requirements by July 1, 2016.
- Prohibits employers from using non-registered foreign labor contractors to supply workers in California.
- Requires foreign labor contractors to disclose specific information in writing to each foreign worker who is recruited for employment in a language that the worker understands.
- Allows for a civil action and penalties for non-compliance and joint liability for employers who use non-registered foreign labor contractors.

Employers who use temporary foreign workers in California should seek the advice of labor and employment and/or immigration counsel.

Health Care Staffing

Employment agencies that provide temporary certified nurse assistants (CNAs) or licensed nursing staff for long-term health care facilities are subject to special requirements. Prior to referring CNAs or licensed nursing staff, an employment agency must perform all of the following actions:

- Conduct a personal interview with each individual.
- Verify the individual's experience, training, references and licensing and certification.
- Verify that the individual has successfully secured a criminal record clearance.[5]

In addition, employment agencies referring CNAs or licensed nursing staff for employment must perform all of the following actions:

- Adopt policies and procedures about prevention of resident abuse.

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[4] Business and Professions Code sec. 9998.15,et seq.

[5] Civ. Code sec. 1812.509(e)

- Provide written verification that referred CNAs or licensed nursing staff do not have unresolved allegations against them involving the mistreatment, abuse or neglect of a patient.
- Provide a list of temporary employees who have been referred to a specific facility during a labor action, if requested by the state Department of Health Care Services.[6]
- Require that any employee referred to a long-term health care facility be identified as a temporary staff person in the facility's daily staffing levels. These staffing levels must be posted in accordance with federal regulations.[7]

Verification for Certified Nurse Assistants

An employment agency that refers temporary CNAs to a long-term health care facility must give the facility written verification that each CNA meets all of the following criteria:

- Is in good standing with state certification requirements
- Has had at least six months of experience working in a long-term care facility
- Meets health and training requirements
- Will participate in the facility's orientation program and any in-service training programs at the facility's request[8]

The employment agency also must provide each CNA's professional certification number and the date his/her certification expires.[9]

Verification for Licensed Nursing Staff

An employment agency that refers temporary licensed nursing staff to a long-term health care facility must provide the facility with written verification that the individual meets all of the following criteria:

- Is in good standing with state certification requirements
- Meets health requirements[10]

Benefits and Contingent Workers

Two court decisions have indicated that, without careful planning on your part, temporary and leased employees can become eligible for employee benefits.

In *Burrey v. Pacific Gas & Electric Co.*, the Ninth Circuit Court of Appeals found that temporary or leased employees may be common-law employees entitled to participate in certain employee benefit plans.[11] In this case, individuals were leased to PG&E through a series of employment agencies for more than a decade. They used PG&E's equipment, including computers, telephones and email. They were sent to the same training classes as PG&E employees, used PG&E business cards and letterhead and drove PG&E cars. Although they were paid by the employment agencies, travel expenses were reimbursed by PG&E.

The court held that unless all contingent workers are specifically excluded from an employee benefit plan, they can become entitled to benefits under the theory that they are common-law employees. The court sent the case back to the trial court to determine if the particular individuals involved met the test of being common-law employees. The Ninth Circuit Court of Appeals found that if the individuals were determined to be common-law employees by the trial court, they should be retroactively eligible for medical, pension and retirement plan benefits, which they had been denied throughout their tenure with PG&E.

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[6] Civ. Code sec. 1812.543

[7] Civ. Code sec. 1812.543(e)

[8] Civ. Code sec. 1812.541

[9] Civ. Code sec. 1812.541(a)

[10] Civ. Code sec. 1812.541(c)

[11] *Burrey v. Pacific Gas & Electric Co.*, 159 F.3d 388 (9th Cir. 1998)

In *Vizcaino v. Microsoft Corp.*, a Ninth Circuit Court of Appeals panel held that current and former temporary employees of Microsoft Corporation should be entitled to the same benefits as were the misclassified independent contractors.[12] For more information on this case, see "Benefits and Independent Contractors" on page 109.

Because of the potential impact of these cases on employers who use contingent workers, employee handbooks and benefit plans should clearly define which individuals are eligible for participation in organization benefit plans. Do not treat contingent workers in the same manner as regular employees. Consult legal counsel before using contingent workers on a long-term basis (more than one year).

Unions and Contingent Workers

According to the National Labor Relations Board (NLRB), temporary employees have the right to join unions.[13] For more information, see Chapter 31, "Labor Relations in Private Employment."

The ruling arose from an NLRB regional director's earlier decision allowing an employer to exclude temporary employees from the organization's regular employees' bargaining unit. The regional director held that because employees supplied by a staffing agency were jointly employed by both organizations, the temporary employees could not join with the regular employees to bargain without the consent of the staffing agency.

On appeal, the NLRB found the temporary employees worked side-by-side with regular employees, performed the same work, kept the same hours and were subject to the same supervision. The NLRB found the temporary and regular employees shared a "sufficient community of interest to constitute an appropriate unit."

As a result of the ruling, for bargaining purposes, temporary employees are considered to be employees of the temporary agency's client. When the temporary employee is jointly employed by both the agency and the client, the temporary employee, without the consent of the agency or client, can:

- Enter into collective bargaining agreements
- Vote in a union organizing campaign
- Join an existing union

Independent Contractors

This section explains the difference between an independent contractor and an employee. The courts and government agencies use many factors to determine independent contractor status. Calling someone an "independent contractor" does not make him/her an independent contractor in the legal sense. Mislabeling a worker as an independent contractor creates potential liability for employment taxes and penalties, and liability for failure to fulfill the many legal obligations owed to an employee, such as wage and hour requirements. For your own protection, make sure that a person working as an independent contractor truly meets the numerous tests required by law.

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[12] *Vizcaino v. Microsoft Corp.*, 173 F.3d 713 (9th Cir. 1999)

[13] *M.B. Sturgis, Jeffboat Division, et al.*, 331 NLRB No. 173 (2000)

Using an accurately classified independent contractor can relieve you of the many burdens placed upon you by state and federal employment laws. For instance, independent contractors:

- Need not be covered by workers' compensation
- Do not have employment taxes deducted from their earnings by an employer
- Have no rights to employee benefits
- Are not employees subject to the Immigration Reform and Control Act (IRCA) of 1986
- Are not covered by many state and federal antidiscrimination laws
- Do not generally subject you to vicarious liability for their acts
- Are not included under Cal/OSHA and federal OSHA regulations in your duty to provide a safe and healthy work environment
- Are not covered by state and federal wage and hour laws
- Are not entitled to unemployment insurance benefits from your account
- Are excluded from coverage under the National Labor Relations Act (NLRA) (related to unions)
- Do not count for purposes of the WARN Act (related to plant closing)

On the other hand, because they are not covered by workers' compensation, an independent contractor or his/her employee can sue you for personal injury sustained on your premises. This litigation can be far more costly than a workers' compensation claim.

Consequences to Misclassification

Mislabeling a worker as an independent contractor creates potential liability for employment taxes and penalties, and liability for failure to fulfill the many legal obligations owed to an employee, such as wage and hour requirements. California courts have decided several cases about who is, or is not, an independent contractor. Cases have been brought for failure to pay overtime, as well as for other labor code violations.

California administrative agencies, the federal Department of Labor (DOL) and the Internal Revenue Service (IRS) closely scrutinize alleged principal/independent contractor relationships to ensure that those relationships are not, in reality, employer/employee relationships. Challenges to the legitimacy of an existing independent contractor/principal relationship can arise in many forms, including:

- Filings for unemployment insurance (UI) benefits
- Claims for unpaid wages
- Claims for workers' compensation
- Charges of employment discrimination
- Investigations by the IRS, the DOL, the Department of Industrial Relations (DIR) and Employment Development Department (EDD) to audit wage payments, workers' compensation coverage and Unemployment Insurance Fund contributions

On both the state and federal level, agency efforts are underway to combat employee misclassification. For instance, in fiscal year 2014, DOL's Wage and Hour Division conducted investigations resulting in more that $79 million in back wages for nearly 110,000 workers in fields such as the janitorial, temporary help, food service, day care, hospitality and garment industries.

For your own protection, make sure that a person working as an independent contractor truly meets the difficult tests required by law. You should consult with legal counsel for assistance in determining independent contractor status.

Willful Misclassification

It is unlawful for any person or employer to "willfully misclassify" an individual as an independent contractor. The law also prohibits employers from charging a misclassified independent contractor for goods, materials, space, rental, services, government licenses, repairs, equipment maintenance or fines that arise from the individual's employment, if the charges would have violated the law if the person had been an employee.[14]

Willful misclassification means: "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor."

The civil penalty for violation of this law ranges from $5,000 to $25,000 for each violation. Other remedies include requiring the employer to display on its website or in the workplace a notice of the serious violation of misclassifying an independent contractor, a statement that the employer has changed its business practices in order to comply with the law, and information on how to contact the Labor and Workforce Development Agency to report misclassification.

The notice must be posted for one year, and signed by an officer of the employer.

The law also imposes joint liability on a person who is retained to assist with classification and who knowingly advises an employer to treat an individual as an independent contractor to avoid employee status. Joint liability does not apply to a licensed attorney or to a person who provides advice to his or her own employer. Joint liability would apply to a non-attorney outside consultant.

These civil penalties are in addition to any fines or taxes owed to the IRS and the EDD or any unpaid wages owed to workers.

Misclassification Amnesty for Motor Carrier Employers

New 2016

A 2016 law establishes the Motor Carrier Employer Amnesty Program for port transportation companies (also known as port drayage companies).

Motor carrier companies can be relieved of liability for penalties associated with misclassification of commercial drivers as independent contractors if the companies enter into a settlement agreement with the Labor Commissioner before **January 1, 2017**, and agree to convert the workers to employees and pay any owed wages, benefits and taxes.

Defining Independent Contractor

California labor law defines an independent contractor as "any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished."[15]

An independent contractor works for another entity under a verbal or written contract, usually for a specific length of time. The independent contractor is responsible for only his/her own work, and is generally responsible for his/her own schedule. The independent contractor must also be responsible for how the work is completed.

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[14] Lab. Code sec. 226.8

[15] Lab. Code sec. 3353

You should assume all workers are employees unless they clearly meet all legal requirements and pass all tests various federal and state agencies use for proper classification of independent contractors. Consultation with legal counsel is usually warranted.

Different Tests to Define Independent Contractor

There is no set definition of the term "independent contractor" that applies for all purposes. The right to control the manner and means by which the individual performs his or her services is generally the most important factor.[16] However, you have to look at the interpretations of the various enforcement agencies and the courts to determine if a worker is an employee or an independent contractor in any given situation. It is possible that the same individual will be considered an employee for purposes of one law and an independent contractor under another.

For example, in a wage claim where employment status is an issue, the California Division of Labor Standards Enforcement (DLSE) will often use the six-prong economic realities test to decide the issue. However, in a separate matter before a different state agency with the same parties and same facts, that agency may be required to use a different test (such as the control test) which may result in a different determination.

These issues are discussed in this section and outlined in the form, Independent Contractor vs. Employee - How Six Agencies Determine Relationships.

You can find extensive information on federal requirements for independent contractor status on the Department of Labor website at www.dol.gov and the IRS website at www.irs.gov. You can find information on state requirements, which vary from federal requirements, on the DIR's website, at www.dir.ca.gov, and the EDD's website at www.edd.ca.gov.

Because different tests may apply, and because the potential liabilities and penalties are significant if the individual is misclassified, each working relationship must be thoroughly researched and analyzed.

Common Misconceptions About Independent Contractors

Many employers believe they will be safe from the significant penalties of misclassification if their relationship meets any of the conditions listed below. This is not the case. Hiring organizations are not immune just because the worker:

- Wanted to be treated as an independent contractor
- Signed a written contract
- Does assignments sporadically, inconsistently or on-call
- Is paid commission only
- Has no supervision
- Performs assignments for more than one organization

Right to Control Test

California courts and administrative agencies generally apply common-law principles to determine independent contractor status. The most important factor is whether the business had the right to direct and control the manner and means of performing the work.[17]

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[16] *Cristler v. Express Messenger Systems, Inc.*, 171 Cal. App. 4th 72 (2009)

[17] *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989); *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093 (9th Cir. 2014)

If your company controls the details and the worker does not have "meaningful discretion" in how he/she completes the work, it is likely that the worker will be found to be an employee and not an independent contractor. If you merely "oversee the results" but not the means of accomplishing the results, courts will generally uphold the independent contractor status.

In one case involving a district manager for an insurance company, the court held that a company can set objectives and minimum standards for an independent contractor without losing independent contractor status. Although the independent contractor agreement asked the worker to meet minimum performance standards, the agreement did not specify how she should meet these standards. It also said she should develop plans to exceed these standards.[18]

According to the court, the company "did not have sufficient control over the details" to render her an employee. The court called it a "classic example of the setting of results while leaving the means to [the worker]."

In another case, an accountant worked for a tax preparation service as an independent contractor for several years before the employer and the independent contractor learned that the accountant should actually be an employee. The two parties agreed to change the individual's status at the beginning of the next calendar year, but the company sold just before the change. The new employer did not reclassify the accountant's status.

The accountant was required to attend staff meetings and fill out time sheets. The employer set the fee schedule for tax prep and collected fees. The accountant had no outside clients, was marketed to clients as an employee and was provided with business cards.

The court of appeal found the plaintiff was an employee, and upheld the lower court's penalty against the employer for failure to pay final wages in the time required by law.[19]

New 2016

In another case, *Alexander v. FedEx Ground Package System, Inc.*, the Ninth Circuit Court of Appeals rejected FedEx's classification of its drivers as independent contractors because FedEx exercised significant control over the drivers, including assigning services areas, controlling which packages were delivered, requiring them to wear FedEx uniforms and to paint their vehicles a specific shade of white and mark them with the FedEx logo, and restricting the times during which the drivers could provide services. Given "the powerful evidence" of FedEx's right to control the manner in which the drivers performed their work, the court held that the drivers were employees as a matter of law.[20] This case ultimately settled for $228 million.

New 2016

A case currently pending before the California Supreme Court, *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* will address the issue of whether the common law right to control test should apply in a wage and hour class action lawsuit.[21]

A lower court ruled that any claims brought under the Wage Order should not use the common law right of control test, but that class certification should instead depend on a Wage Order's expansive definition of "employee" to bolster the employees' claim that they were misclassified as independent contractors. If the lower court's ruling is allowed to stand after review, it may be more difficult to defeat an independent contractor misclassification claim when the claim involves allegations of Wage Order violations, such as failure to pay the required minimum wage.

The lower court' decision could be seen as part of a growing trend toward a more expansive definition of employer and employee — and greater liability for companies that contract for labor. See, for example, "Liability for Employers That Contract for Labor" on page 89.

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[18] *Beaumont-Jacques v. Farmers Group Inc.*, 217 Cal.App.4th 1138 (2013)

[19] *Bain v. Tax Reducers, Inc.*, 219 Cal.App.4th 110 (2013)

[20] *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014)

[21] *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, No. S222732 (Jan. 28, 2015)

Ask legal counsel to review your independent contractor arrangements.

Factors Supporting Right To Control

Sometimes who has the right of control is readily apparent. If not, courts have listed additional factors that can show whether the right of control exists:

- If you had the right to terminate at-will without cause
- If the worker is engaged in a distinct occupation or business
- If the work is the kind usually performed under close direction or by a specialist without supervision
- The skills required in the particular occupation
- If you or the worker supplied the instruments, tools and place for performing the work
- The length of time for which the services are to be performed
- The method of payment, whether by time or by job
- If the work is part of your regular business
- If the parties believe they are creating an employer/employee relationship[22]

Even where there is an absence of control over work details, an employer-employee relationship will be found if:

- The principal retains pervasive control over the operation as a whole.
- The worker's duties are an integral part of the operation.
- The nature of the work makes detailed control unnecessary.[23]

Other points to remember in determining if a worker is an employee or independent contractor:

- The existence of a written agreement purporting to establish an independent contractor relationship is not determinative.[24]
- The fact that a worker is issued a *Form 1099* instead of a *Form W-2* is not determinative with respect to independent contractor status.[25]
- The fact that a worker can and does work for other businesses will be helpful in showing an independent contractor relationship.

When considering your independent contractor relationships you should:

- Carefully analyze the work to be completed to determine if an in-house employee is more suited to perform the work than an outside contractor.
- Use clearly written, explicit independent contractor agreements for each contractor hired, preferably prepared by legal counsel.
- Put procedures in place to revisit a contractor's agreement if the job duties or expectations change over time.

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[22] *Empire Star Mines Co. v. California Employment Commission*, 28 Cal. 2d 33, 43 (1946)

[23] *Yellow Cab Cooperative v. Workers Compensation Appeals Board*, 226 Cal.App.3d 1288 (1991)

[24] (*Borello, Id.* at 349)

[25] *Toyota Motor Sales v. Superior Court*, 220 Cal.App.3d 864, 867 (1990)

Independent Contractor Ruling Gives Guidance

A California case provides employers with a good checklist on how to treat workers, such as salespeople, so the employer can maintain an independent contractor relationship. *Arnold v. Mutual* details the factors under which insurance agents may properly be classified as independent contractors.

A salesperson filed a lawsuit against Mutual, alleging that she should have been classified as an employee, not an independent contractor. The court of appeal applied the "right of control" test: Does the employer have the right to control the manner and means by which the individual performs his work? The *Arnold* court examined the evidence presented by Mutual and found that Mutual exercised little control over the plaintiff (or over the other agents) and that they were properly classified as independent contractors.[26]

The following factors, as a whole, were persuasive to the court:

- Arnold signed a contract with Mutual explicitly stating that Arnold was an independent contractor. Both parties believed they were creating an independent contractor relationship at the start of the arrangement.
- Arnold used her own judgment in how she would do her work, including:
  - Determining who she would solicit for applications for Mutual's products;
  - The time, place and manner in which she would solicit; and
  - The amount of time she spent soliciting for Mutual's products.
- Arnold's appointment with Mutual was non-exclusive, and she, in fact, sold for other insurance companies during the same time as she worked for Mutual.
- No one at Mutual monitored or supervised Arnold's work or evaluated her performance.
- The only minimal performance requirement in the agreement was that Arnold had to submit one application for Mutual's products within each 180-day period.
- Training offered by Mutual was voluntary for agents. The only mandatory training was compliance training required by state insurance law.
- Office space was available to Mutual agents on an optional basis. However, the agents had to pay a fee for the workspace and for telephone service.
- Mutual did not provide business cards, vehicles or computers, free of charge. Mutual also did not pay or reimburse for business expenses.
- Arnold's payment was based on her results, not the amount of time she spent working on Mutual's behalf.
- Arnold was engaged in a distinct occupation and was responsible for maintaining her own insurance license.

Collective Bargaining Agreements May Impact Status

The right to control the work is still the most important factor in determining independent contractor or employee status, but courts must also consider other factors. Some of those other factors include if you provide benefits to the workers and the terms of a collective bargaining agreement (CBA) that's in place.

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[26] *Arnold v. Mutual Omaha Insurance Company*, 202 Cal. App 4th 580 (2011)

In *Arzate v. Bridge Terminal Transport, Inc.*, truck owners transporting cargo between ports and an employer's customers brought suit against Bridge Terminal Transport, Inc., for failure to:

- Pay minimum wage
- Pay all wages due upon termination
- Provide itemized wage statements

The truck drivers were members of the Teamsters Union and were subject to a CBA between Bridge Terminal and the Teamsters. According to the CBA, the truck drivers who brought this claim were classified as employee owner-operators who worked exclusively for Bridge Terminal. The drivers received W-2 wage and tax statements which indicated they were employees of the organization and they were eligible for organization's health insurance plan.

In *Arzate v. Bridge Terminal Transport, Inc.*, the Court of Appeal ruled that the drivers were employees, not independent contractors, and returned the case to the lower court.[27]

Defining Independent Contract for Labor Enforcement Agencies

Both state and federal agencies have increasingly shown an interest in cracking down on misclassification of workers as independent contractors, with amplified enforcement efforts.

California Enforcement

Because the state wage and hours regulations apply only to employees, the state Labor Commissioner has no jurisdiction to order wage payments to independent contractors.[28] Therefore, the true nature of the relationship between a wage claimant and a purported employer is addressed by the state Labor Commissioner when the issue of independent contractor status is raised in a wage claim or audit proceeding.

The consequences of misclassifying an employee as an independent contractor in a wage or hour context include, but are not limited to, liability for unpaid wages for a period of up to three years, including potential overtime pay. If employee status is found, the failure to pay all wages due every pay period can result in penalties of $100 to $200 per employee per pay period, and up to 25 percent of the wages not paid to each employee for each pay period.[29] Moreover, employers making lump sum payments to individuals improperly classified as independent contractors may violate the statutory obligation to provide itemized wage statements to employees each pay period, and become subject to additional civil penalties of $250 per employee for the first violation and $1,000 per employee for each subsequent violation.[30]

In addition, failing to pay all wages due and owed to a terminated employee who was improperly classified as an independent contractor in a timely fashion can subject you to penalties of up to 30 times the employee's daily wage without regard to the actual amounts of unpaid wages.[31]

The Labor Commissioner has made it a top priority to address "wage theft" which includes failure to properly classify workers as employees and pay them appropriate wages under the Labor Code. The DIR will work with various other state agencies to ensure compliance, including EDD, the Franchise Tax Board, the Contractors State License Board and other agencies or departments.

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[27] *Arzate v. Bridge Terminal Transport, Inc.*, 192 Cal. App. 4th 419 (2011)

[28] *Resnik v. Anderson & Miles*, 109 Cal. App. 3d 569 (1980)

[29] Lab. Code sec. 210

[30] Lab. Code sec. 226.3

[31] Lab. Code sec. 203

The California Division of Labor Standards Enforcement starts with the presumption that a worker is an employee.[32] However, this can be rebutted based on a number of factors. Using what is often called the economic realities test, the most significant factor is the right to control, but additional factors will also be examined. For more information, see "Factors Supporting Right To Control" in Chapter 6, page 101.

Federal Enforcement

New 2016

In July of 2015, the federal U.S. Department of Labor's Wage and Hour Division (WHD) released administrative guidance on independent contractor classification. The WHD continues to use the economic realities test to examine the nature of the worker's relationship. However, the WHD states that no one factor is controlling and, most importantly, these factors should be examined by looking at the Fair Labor Standards Act and its expansive definition of what it means to "employ."

The FLSA broadly defines employ to mean "to suffer or permit to work." According to the WHD, the ultimate inquiry under the FLSA is whether the worker is economically dependent on the employer (an employee) or truly in business for himself/herself (an independent contractor).

In short, according to the WHD, "most workers are employees under the FLSA's broad definition." This is the premise that the DOL will apparently start with in its enforcement efforts.

For more information on DOL's misclassification initiative, visit the DOL's Misclassification of Employees as Independent Contractors page at http://www.dol.gov/whd/workers/misclassification/.

Defining Independent Contractor for Unemployment and Disability Insurance

For the purposes of unemployment and disability insurance the Employment Development Department (EDD) defines an employee as an individual who, under usual common-law rules, has a status of an employee.[33] The EDD applies the California right of control test and, where right of control is not readily apparent, examines the list of secondary factors.

If individuals classified as independent contractors are found to be employees, you will be assessed for amounts due for unemployment insurance contributions, disability insurance contributions and state income tax withholding amounts. In addition, if you, without good cause, fail to pay required contributions for unemployment or disability insurance benefits, you are liable for a penalty of 10 percent of the amount of the contributions (plus interest) on any unpaid contributions.[34]

For more information on Unemployment Insurance and independent contractors, see "Unemployment Insurance and Independent Contractors" in Chapter 16, page 407.

Defining Independent Contractor for Federal Tax Purposes

The IRS will determine if an employment relationship exists between a worker and employer, and if that relationship requires payment of federal employment taxes, including Social Security taxes, payment under the Federal Unemployment Tax Act, and withholding of worker-owed employment taxes.

Misclassification of bona fide employees as independent contractors results in the federal government collecting significant financial penalties from employers, and the IRS aggressively auditing organizations to expose abuses. It is estimated that as much as $1.5 billion in income, Social Security withholdings and unemployment tax revenue is lost annually due to misclassification of as many as 3.5 million workers as independent contractors.

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[32] Lab. Code sec. 3357

[33] UI Code sec. 621(b)

[34] UI Code secs. 1112, 1113

Organizations judged by the IRS to have misclassified employees as independent contractors face all of the following consequences:

- Large government fines
- Payment of employment taxes, including 100 percent of the employer's Social Security contributions
- Payment of federal income taxes not withheld
- An employment insurance tax equal to 6.2 percent of the compensation paid to the worker

The organization is not entitled to collect these amounts from the alleged independent contractor.

The IRS Test

In addition to the factors considered by California agencies, the IRS examines its own set of factors to determine if an individual is an independent contractor. Moreover, the IRS weighs the factors differently from its California counterparts.

When determining the level of control and independence of workers, the IRS generally looks at the following factors:

- **Behavioral:** Are the worker's actions and work hours controlled by the hiring party?
- **Financial:** Does the hiring party provide the worker with expense accounts, expense reimbursements, tools, supplies and/or other equipment?
- **Type of Relationship**: Does the worker have benefits, such as vacation, PTO, sick leave, health insurance, etc.? Is the worker performing tasks that are a key function of the hiring party's business? Is the relationship for a specified period of time?

You must consider all of these factors, along with the factors outlined in the California common-law test, before deciding to classify a worker as an independent contractor.

Always document how you analyze each factor while making your determination. If you wrongly classify an employee as an independent contractor, the IRS can hold you liable for employment taxes.

The IRS website, at www.irs.gov, provides extensive guidance on properly classifying a worker as an independent contractor. Please note that you must satisfy California's test as well as the IRS test — they are not mutually exclusive.

Defining Independent Contractors With Help From the IRS and EDD

Both the IRS and the EDD will provide a written determination as to whether a worker is an employee or an independent contractor for tax withholding purposes. When you request a determination for federal tax purpose, the IRS provides *Form SS-8 - Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding* to fill out. When you request a determination for state tax purposes, the EDD provides *Form DE 1870 - Determination of Employment Work Status for Purposes of State of California Employment Taxes and Personal Income Tax Withholding* but also will accept the IRS's *Form SS-8*. Contact your local IRS or EDD office for copies of these forms.

Though forms *SS-8* and *DE 1870* can be helpful for a self-audit, do not use them to seek a written determination from the IRS or EDD. The agencies will likely find an employment relationship exists, and you can become subject to an audit as a result of requesting a written determination.

Consider using the *Form SS-8* as an internal tool to determine what factors the IRS and EDD consider in evaluating if a worker is an employee or an independent contractor.

Another alternative is to use EDD's *Form DE 38 - Employment Determination Guide*, a worksheet designed for a business proprietor to use while conducting a self-audit.

In *Air Couriers International et al v. Employment Development Department*, an employer issued a complaint against the EDD for recovery of unemployment taxes paid for what the organization claimed were independent contractors. However, the complaint backfired. A California Court of Appeal found that the individuals were actually employees. The simplicity of the work involved (package delivery) made detailed supervision and control unnecessary. The drivers worked regular schedules, were not involved in a separate profession or operating their own business and did not make major investments in materials or equipment. Additionally, the job they performed was an integral and entirely essential aspect of the business.[35]

Licensure and Contractors

There is a presumption that where an unlicensed worker performs services that require a license, that worker will be considered an employee and not an independent contractor.[36] This will be true even if you are using a licensed contractor and then his/her license expires.

Reporting Obligations and Independent Contractors

All businesses and government entities who hire independent contractors must file reports with the EDD. This independent contractor reporting program is designed to locate parents who are delinquent in their child support obligations.[37]

The report must be made on the *Independent Contractors Report - DE542*.

Independent Contractors Report - DE542

Specific information must be reported within 20 days of entering into a contract for, or making payments of $600 in any calendar year to an independent contractor. EDD matches the reports against child support records to locate parents who are delinquent in payments.

When hiring an independent contractor, the law requires a report from anyone who is:

- Doing business in California
- Deriving trade or business income from sources within California
- Otherwise subject to California law

Businesses operating outside California are subject to this law. For example, an independent contractor who works in California for a business based in Texas must be reported to California's EDD.

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35. *Air Couriers International et al v. Employment Development Department*, 150 Cal. App. 4th 923 (2007)
36. Lab. Code sec. 2750.5
37. UI Code sec. 1088.8

Hiring entities subject to the law include:

- Individuals
- Corporations
- Associations
- Partnerships
- Agents of any of the above
- California or any of its political subdivisions
- Charter cities
- Any political body that is not a subdivision or agency of the state

Hiring entities who have no employees and, therefore, are not registered with EDD, are not required to register and receive a California employer account number solely for purposes of reporting independent contractor service providers. Unregistered hiring entities will complete the required report using a Social Security number or Federal Employer Identification Number (FEIN).

Both Contractor and Employee

You may have a worker who is classified as an employee who also performs work as an independent contractor. For example, a sales clerk (employee) might own a small janitorial firm that is hired to clean the store each evening (independent contractor). Report the individual under both the New Employee Registry program, *New Employees Report - Form DE 34*, and under the Independent Contractor Reporting program, *Independent Contractors Report - DE 542*.

New Employees Report - Form DE34

Independent Contractors Report - DE542

Independent Contractor Report Content

The independent contractor reporting requirements apply if an independent contractor is hired and:

- You are required to file a *Form 1099-MISC* for the services performed by the independent contractor.
- You pay the independent contractor $600 or more or enter into a contract for $600 or more. If the cost of parts and materials is included in the contract or payments, this cost must be included in determining if the independent contractor has been paid $600 or more.
- The independent contractor is an individual or sole proprietorship.

If all three of the above statements apply, you must report the independent contractor to the EDD. No reporting is required for independent contractors that are corporations, general partnerships, limited liability partnerships or limited liability organizations.

If you are a California business or government entity, you must report all independent contractors who meet the minimum dollar requirements regardless of where they live or work. For example, a California business hires an independent contractor who lives and works in New York. You must report this independent contractor to the EDD.

If the independent contractor works in California, you must report to the EDD even if you are based in another state. A business based in New York must report to the EDD if it hires an independent contractor who lives and works in California.

The EDD requires a report of all of the following:

- The hiring entity's:
  - FEIN
  - California employer account number
  - Social Security account number (if applicable)
  - Business name, address and telephone number
- The independent contractor's:
  - First name, middle initial and last name
  - SSN
  - Address
- The start date of the contract
- The contract expiration date (unless it is an ongoing contract)

Independent contractors may have FEINs and business names, making it difficult to determine if they are sole proprietors whom you must report. Reporting a FEIN does not meet the legal requirement of reporting the independent contractor's SSN. By statute, you must obtain and report the first name, last name and SSN of any independent contractors that are sole proprietors. The IRS's *Form W-9* requires sole proprietors to list their first and last names. If you still don't know the SSN after reviewing the *Form W-9*, you can ask the independent contractor for the SSN. If the independent contractor does not provide it, fill in the SSN box on the *Independent Contractors Report - DE 542* with zeroes (000000000). *Form W-9* is available on the IRS website at www.irs.gov/.

Independent Contractors Report - DE542

Forms for Independent Contractor Reporting

Independent Contractors Report - DE 542 is also available online from the EDD at www.edd.ca.gov/pdf_pub_ctr/de542.pdf.

Mail or fax the completed report to:

Employment Development Department
P.O. Box 997350, MIC 96
Sacramento, CA 95899-7350
Fax: (916) 319-4410

For a convenient method, employers are encouraged to report online, using EDD's "e-Services for Business" at https://eddservices.edd.ca.gov/.

When hiring a large number of independent contractors, you can send the information via magnetic media. For more information, contact the EDD's Magnetic Media Unit at (916) 651-6945.

Independent Contractor Report Filing Deadlines

Send the *Independent Contractors Report - DE 542* to the EDD within 20 days of entering into a contract for $600 or more in any calendar year with an independent contractor or within 20 days of making payments totaling $600 in any calendar year to an independent contractor, whichever is earlier. The contract can be written or verbal. If you are unable to determine when total payments issued equal or exceed $600, estimate the dollar amount of the contract and check the box on the *Independent Contractors Report - DE 542* that indicates ongoing.

If you hire an independent contractor on more than one occasion during a year, report the independent contractor at whatever point the $600 threshold is met, even if it is not during the first period of work. After you make the report for a calendar year, you need not file further reports that year if the same independent contractor receives another $600.

Independent Contractor Reporting Penalties

There is a penalty of $24 for each instance of late filing or failure to file the independent contractors report, unless there is good cause. If a conspiracy exists between the hiring entity and the independent contractor to conceal the report or to supply a false or incomplete report, the penalty increases to $490.

Other Laws Applicable to Independent Contractors

Though retaining true independent contractors can allow you to avoid many employment obligations, the following concerns require your attention.

Harassment and Independent Contractors

California's Fair Employment and Housing Act (FEHA) protects independent contractors from harassment.[38] FEHA makes it illegal to harass an independent contractor, defined as any "person providing services pursuant to a contract," on the basis of race, religious creed, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age or sexual orientation. For more information, see "Harassment" in Chapter 27, page 783.

Benefits and Independent Contractors

Independent contractors typically are ineligible for benefits offered to employees, such as health insurance, vacations and retirement plans. However, an employee misclassified as an independent contractor could retroactively be entitled to those benefits under a Ninth Circuit Court of Appeals decision.[39] In that case, the IRS conducted an audit of freelancers hired as independent contractors by Microsoft Corporation and found them to be employees. These employees brought suit and were found to be eligible for Microsoft's retirement and stock option plans for the period they were misclassified. The court reached this decision despite the fact that the freelancers:

- Signed contracts expressly agreeing to work as independent contractors
- Received higher wages than regular employees in lieu of fringe benefits
- Were paid through the accounts receivable department after submitting invoices

Workers' Compensation and Independent Contractors

Misclassification of employees as independent contractors can result in denial of workers' compensation coverage, penalties for failure to provide workers' compensation, and payment of workers' compensation premiums from the date of hire of the independent contractor(s).[40]

If you have misclassified an individual as an independent contractor and have not provided him/her with workers' compensation coverage, you can be held liable for civil tort liability to the individual and to third parties who are injured as a result of negligent acts by the misclassified individual during the course of employment. In addition, if you fail to secure workers' compensation insurance for your employees, you are subject to all of the following potential liabilities:

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[38] Govt. Code sec. 12940 (h)(1)

[39] *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996)

[40] Lab. Code sec. 226.8

- Workers' compensation claims and lawsuits filed by injured employees
- A penalty of up to $10,000 payable to the state[41]
- An additional penalty of 10 percent of any workers' compensation benefits recoverable by the injured employee[42]
- Attorneys' fees[43]

Liability for Injuries to an Independent Contractor's Employee

An independent contractor's employee who is injured by the subcontractor's negligence cannot sue the party who hired the independent contractor. In *Toland v. Sunland Housing Group, Inc.*, the California Supreme Court held that it's unfair to subject the hiring party to civil litigation when the independent contractor, who had control over the work, can't be subjected to civil litigation because of the rule of workers' compensation exclusivity.[44]

Similarly, in *Camargo v. Tjaarda Dairy*, a dairy was not liable for injuries to a trucking company's employee on the theory that the dairy negligently hired the trucking company. The court found the dairy had exercised no control over the work performed by employees of the trucking company whose liability is limited by workers' compensation law.[45]

Liability for injuries to a contractor's employee outside workers' compensation can be assessed against a hiring party where that party provides faulty equipment that causes injury to the contractor's employee[46] or where the hiring organization retains control of safety procedures in the work environment and is negligent in exercising that control.[47]

For information on Workers' Compensation and subcontractors, see "Subcontractor Employees" in Chapter 25, page 664.

Interns

Proceed carefully when deciding to use unpaid interns. Many employers believe all interns are unpaid workers. Unfortunately, this is not the case. Not all interns are unpaid and most interns are considered employees in the eyes of the law. Always consult with counsel or an experienced HR professional when using interns.

In 2010, the California Division of Labor Standards Enforcement (DLSE) issued an opinion letter providing some clarification and guidance on when an intern is truly an intern. The DLSE previously applied a stringent, 11-factor test when evaluating an employer's classification of a worker as an unpaid intern. This differed from the less stringent, six-factor test used by the federal Department of Labor (DOL). In its opinion letter, the DLSE decided to change course and apply the DOL's six-factor test to evaluate a specific internship program.[48]

[illegible]

[illegible]

[illegible]

[illegible]

[45] *Camargo v. Tjaarda Dairy*, 25 Cal. 4th 1235 (2001)

[46] *McKown v. Wal-Mart Stores, Inc.*, 27 Cal. 4th 219 (2002)

[illegible]*ation*, 27 Cal. 4th 198 (2002)

[illegible]

"Intern" is a loosely used term, but for a worker to qualify for a nonpaid internship, the criteria below must be used in analyzing the position.

The six-factor test used by both the DOL and the DLSE is as follows:

- The training, even though it includes actual operation of the employer's facilities, is similar to that which would be given in a vocational school
- The training is for the benefit of the trainees or students
- The trainees or students do not displace regular employees, but work under close observation
- The employer derives no immediate advantage from the activities of trainees or students, and, on occasion, the employer's operations may be actually impeded
- The trainees or students are not necessarily entitled to a job at the conclusion of the training period
- The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training

Though the DLSE changed the factors it uses, it does not treat internships lightly. Use caution when using individuals who are seeking training or internship programs.

If you have unpaid "interns" working for you, make sure you use specific criteria to define the work that the interns do and that you follow applicable legal requirements. Most "interns" will be considered employees under state and federal law, and you will need to comply with wage and hour laws, including paying them at least minimum wage. Closely follow the six-factor test used by the federal and state agencies.

California's Fair Employment and Housing Act (FEHA) was amended to respond to court decisions that held unpaid interns and volunteers were not entitled to discrimination and harassment protections. FEHA provides the following protections to unpaid interns and volunteers.[49]

The law:

- Provides protections against harassment to unpaid interns and volunteers.
- Provides protections against discrimination in an unpaid internship or in another limited duration program that provides unpaid work experience.
- Extends religious belief protections and religious accommodation requirements to anyone in an apprenticeship training program, an unpaid internship or any other program to provide unpaid experience in the workplace or industry.

Volunteers

According to California's Division of Labor Standards Enforcement (DLSE), a "volunteer" is generally a person who performs work for public service, religious or humanitarian reasons without promise, expectation or receipt of compensation for that work.

Whether a person is properly classified as an employee or a volunteer is determined by the parties' intent. If a person intends to volunteer his/her services for public service, religious or humanitarian objectives, not as an employee and without expecting pay, the person is not an employee of the religious, charitable or similar nonprofit corporation that receives the services.[50]

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[49] Govt. Code sec. 12940

[50] DLSE Opinion Letter 1988.10.27; DLSE *Enforcement Policies and Interpretations Manual* sec. 43.6.7

However, the definition of volunteer may be different for different purposes.

The term "volunteer" cannot be loosely used to evade the requirements of the law.

Particularly during the summer, employers often receive requests from minors who offer to "volunteer" their services to gain work experience. An individual cannot "volunteer" to work at a "for-profit" company. A person who offers to work for nothing for the purpose of gaining experience is an employee, not a volunteer.

If you are a for-profit entity, people who perform work for you are generally employees, regardless of their age, and you should comply with wage-and-hour laws, anti-discrimination laws and anti-harassment laws.

California's Fair Employment and Housing Act (FEHA) was recently amended to respond to court decisions that held that volunteers were not entitled to harassment protections. FEHA was amended to specifically provide volunteers with protections against harassment.[51]

Telecommuters

Telecommuting is an accepted practice in many workplaces. The majority of those who telecommute do so from home. Whether working at the kitchen table or in a bedroom converted to an office, these individuals arrive at work via technology rather than the freeways. However, the very technology that allows the flexibility to work from home creates questions that must be answered if the employment relationship is to run smoothly and you are to avoid litigation.

Telecommuting arrangements generate a number of legal issues relating to federal and state wage and hour laws. With the worker off-site, it becomes difficult to track time worked, overtime liability, compliance with meal and rest periods and work off the clock. Regardless of the challenge, you must ensure compliance with federal and state wage and hour laws.

Telecommuting arrangements also raise questions about federal and state workplace safety laws. Although you don't control the worker's premises and workstation, you do bear responsibility for the worker's safety. In addition, injuries that arise out of and in the course of performing the job are compensable under workers' compensation.

Under most circumstances, an employee is not covered for an injury while traveling to or from work, but the situation may be different when the employee works off-site. An injury occurring while traveling between work and a home office would likely be considered compensable.

Another issue concerns liability for injuries incurred while working at home. Telecommuting programs may increase the risk of fraudulent workers' compensation claims. However, injuries incurred in a telecommuting employee's home may be covered by workers' compensation if the employee was injured in the course and scope of employment. Some of the factors considered when determining liability include:

- The regularity with which work is performed at home
- If the home office is being used for the employee's convenience rather than as an employer requirement
- If there is business equipment and a designated workspace in the home

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[51] Govt. Code sec. 12940

Finally, confidentiality and privacy issues may arise, including monitoring how the worker:

- Uses email and the Internet
- Accesses company information
- Protects company secrets at his/her home or other remote locations

A strongly worded and properly distributed policy on Internet security and email usage can help you assert control over electronic communications. In addition, advise and train all employees about handling electronic information, managing and reporting security breaches and using available encryption technology to transmit critical information.[52]

In your policy, include a reminder that users should have no expectation of privacy or confidentiality when using work-related computer or Internet resources, regardless of where data is stored — on your servers or a third-party server.

CalChamber's Employee Handbook Creator can help you easily create an employee handbook that contains this policy. Purchase at the ***CalChamber store***.

Posters

Laws that require an employer to display posters do not contain exemptions for home offices. An employee working at home should post all required workplace posters in his/her home office.

City and County Taxes and Licenses for Telecommuters

Cities and counties cannot impose business taxes and related licensing requirements on an employee working at home.[53] For purposes of this law, "employee" means a common-law employee as reflected in rulings or guidelines used by either the Internal Revenue Service or the California Franchise Tax Board.

Individuals who work at home operating as independent contractors remain subject to city and county taxes and licensing requirements. For more information on the difference between employees and independent contractors, see "Independent Contractors" on page 96.

Telecommuting as a Reasonable Accommodation

Telecommuting may be seen as a reasonable accommodation under the Americans with Disabilities Act (ADA) and the California Fair Employment and Housing Act (FEHA). California's disability regulations specifically list "permitting an employee to work from home" as a reasonable accommodation.[54] The Equal Employment Opportunity Commission (EEOC) released an ADA guidance memorandum advising employers to, at a minimum, consider telecommuting as a reasonable accommodation option for individuals with disabilities, even if the employer does not maintain a telecommuting program for other employees.

Telecommuting may be required to accommodate an individual with a disability who can perform quality work at home, particularly when an employer implemented a telecommuting program for other reasons, such as recruiting or retaining workers. If attendance at the assigned worksite is not an essential job function, then working at home may be a reasonable accommodation.[55]

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[52] *TBG Insurance Services Corp. v. The Superior Court of Los Angeles County*, 96 Cal. App. 4th 443 (2002)

[53] Bus. & Prof. Code sec. 16300

[54] 2 CCR sec. 7293.6 (p)(2)

[55] EEOC Fact Sheet, "Work at Home/Telework as a Reasonable Accommodation," 10/27/2005

If the request to work from home is granted as a reasonable accommodation for a disability, you probably have the same obligation to make reasonable accommodations for the employee's home office as you would for the employee's on-site office. As part of the accommodation, you may also be expected to equip the home office with an ergonomic chair, desk and computer with special data entry devices and Internet connectivity.

However, it would probably not be reasonable to require you to make major structural modifications to the employee's home, such as wheelchair ramps and accessible restrooms. For more information on telecommuting and reasonable accommodations, see "Telecommuting as a Reasonable Accommodation" in Chapter 28, page 853.

Employees Located in Other Regions

If an employee works outside the state in which the employer's company office is located, the law in the state in which the employee works is the law that covers him/her. For example, an employee in Nevada working at home for an employer headquartered in California is governed by Nevada employment laws. However, if the out-of-state employee travels to California to work for a California based employer, California's overtime laws apply to any work for a full day or week.[56]

Similarly, for employees outside the city or county where the company's office is located, make sure you monitor and comply with local ordinances affecting employment in the employee's location. For example, if an employee's home office is located in San Francisco, the employer must comply with the city's discrimination ordinances.

Workers' Compensation and Telecommuters

Telecommuters are covered by workers' compensation. Under workers' compensation, if an employee suffers an injury on the job, you are liable for his/her temporary disability benefits, medical expenses and possibly a permanent disability award based on the long-term effects of the injury. Telecommuters have the same protections as employees working in the organization's office. If an injury arises out of and in the course and scope of employment, the employee is eligible for workers' compensation. However, it may be difficult to determine if a telecommuter's injury occurred in the course and scope of employment.

It is important to consider the following issues:

- The activities that are considered part of the job scope and therefore covered by workers' compensation.
- Whether there is a risk of increased workers' compensation claims because there are not likely to be witnesses to accidents, and the worker may face increased stress due to the isolation and monotony of working at home, potentially leading to a stress claim.

Establishing a Telecommuting Policy

Adopt a systematic approach to telecommuting requests, perhaps by creating a standard request form that you can use to track any inequities in the decision-making process. Stay out of the issue of why the employee wants to telecommute altogether, to avoid making a value judgment about whether one employee's new baby is more important than another employee's plans to go to law school at night.

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[56] *Sullivan v. Oracle Corporation*, 51 Cal. 4th 1191 (2011)

Although the following may not apply to all employers, you should at least consider the following issues when developing your telecommuting policy:

- The criteria for assessing whether an employee can work remotely.
- The manner in which home office expenses and expenses for travel and parking at the company will be handled.
- How managers are expected to manage productivity and adherence to company policies such as drug, alcohol and dress policies.
- The logistics for supporting telecommuters needs, such as support staff, office supplies and equipment.
- The logistics for supporting telecommuters when they visit the company. For example, office space, parking spots, and the use of support staff.
- Which meetings will require physical attendance by telecommuters and which can be managed by phone or over the Internet.
- The need for special policies for telecommuters, such as requiring them to abstain from using their children to help with work tasks, as this may be considered a violation of child labor laws.
- The applicability of the company's computer and phone usage policies to telecommuters or the need for amended policies for telecommuters only.
- How expenses for moving company equipment will be managed if the telecommuter moves.
- How the termination of telecommuters will be managed, especially the return of company equipment and payment of final wages.
- How to handle off-the-clock work issues, if the worker is nonexempt.

Paying Telecommuters

Companies must comply with the wage and hour requirements for telecommuters and must pay exempt employees their full salary for any day on which they perform any work.[57] When an employee, regardless of whether he/she telecommutes, is terminated, California law specifies that all unpaid wages and accrued but unused vacation are due and payable immediately.[58]

If a telecommuter is nonexempt, he/she must maintain a record of his/her hours, including meal and rest breaks. You may also be required to pay nonexempt telecommuters overtime. When an employee telecommutes, you must trust that employee to record hours accurately. You must also determine how the telecommuter will transmit his/her hours to the payroll department.

Determine how you will monitor a nonexempt employee's work hours and provide the nonexempt employee the required meal and rest breaks. You must record the hours a nonexempt employee works, including when meal breaks are taken.[59]

California's Labor Code requires employers to post a notice informing employees of the regular time and place of wage payment.[60] However, a telecommuting employee might prefer to receive his/her paycheck by mail or direct deposit, if available.

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[57] 29 CFR sec. 541.602(a

[58] Lab. Code sec [illegible]

[59] Lab. Code sec [illegible]

[60] Lab. Code sec [illegible]

The California Labor Code requires an employer to reimburse an employee for all money the employee necessarily expends or loses in direct consequence to the performance of his/her duties.[61]

The employee who normally telecommutes and incurs no commuting costs can successfully argue that you must reimburse him/her for mileage when you require him/her to come to the company office.

Overtime and Off-the-Clock Work

You should also determine how to manage the approval of overtime work. If you knew or had reason to know overtime was being worked by a telecommuting employee, you must pay overtime for all overtime hours worked even if the telecommuter was not authorized to do so.[62] You could argue that you had no knowledge or reason to know an employee was working overtime at home. However, a sudden increase in work completed or an employee's comment that he/she "simply can't get it all done in eight hours (or 40 hours)" could be construed as reason for you to know that the telecommuter was working overtime.

Remote Workers pose specific concerns with regard to off-the-clock work. For more information, see "Prohibiting Off-the-Clock Work" in Chapter 12, page 332.

You should also consider whether the telecommuter's on-call time is compensable. If the telecommuter is free to do whatever he/she chooses at home while waiting for the call to begin work, wages probably are not required for that time. For more information, see "On-Call and Standby Pay" in Chapter 11, page 268.

Scheduling Requirements in San Francisco

San Francisco has enacted specific ordinances which may affect how you schedule your employees. These measures include:

- Family Friendly Workplace Ordinance which requires flexible-working arrangements for employees with care giving responsibilities
- Retail Workers Bill of Rights which provides certain covered workers with protections relating to shift scheduling and shift predictability and also receive increased opportunities to transition from part-time to full-time work. Workers receive protections relating to shift scheduling and shift predictability and also receive increased opportunities to transition from part-time to full-time work.

If you have employees in San Francisco, please visit San Francisco's Office of Labor Standards Enforcement, http://sfgsa.org/index.aspx?page=391, for more information regarding compliance with these specific laws.

Industrial Homeworkers

California's Labor Code and the Fair Labor Standards Act (FLSA) regulate certain types of work performed in the home. Though most of these laws target manufacturing, they can be construed broadly enough to include much of the work done using home technology. If industrial homework laws apply, permits are required. You have a number of legal responsibilities as an employer of an industrial homeworker.

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[61] Lab. Code sec. 2802

[62] IWC Wage Orders sec. 3

Industrial homework is the manufacture of materials or articles in a home for an employer when these articles or materials are not for the personal use of the employer or a member of his/her family. Industrial homework includes activity to make, process, prepare, alter, repair or finish (in whole or in part) or to assemble, inspect, wrap or package any articles or materials.

The Labor Code establishes restrictions on industrial homework activities in any room, house, apartment or other premises used in whole or in part as a place of dwelling, including outbuildings, such as garages, under the control of the person dwelling on the premises.[63]

Licenses and Permits for Industrial Homework

To employ an industrial homeworker in any industry, you must have a valid industrial homework license from the California Division of Labor Standards Enforcement (DLSE). This requirement applies to any person who:

- Engages or permits any person to do industrial homework
- Tolerates or permits articles or materials under his/her custody or control to be manufactured by industrial homework

Each employer of industrial homeworkers must pay a fee of $100 for a license, which is valid for a period of one year from the issue date unless revoked or suspended. The DLSE can revoke or suspend the license for violation of the law or regulations.[64]

An industrial homeworker must also have a valid homeworker's permit issued by the California Division of Labor Standards Enforcement (DLSE). The permit fee is $25.[65] The permit is valid for industrial homework performed for the particular licensed employer for a period of one year, unless revoked or suspended sooner. The permit applies only to the particular applicant in his/her own home. The DLSE can waive the fee if the applicant establishes financial hardship.

The DLSE will not issue a homeworker's permit to any person:

- Who is under 16 years of age
- Who suffers from an infectious, contagious or communicable disease
- Who is living in a home that is not clean, sanitary and free from infectious, contagious or communicable disease[66]

Prohibited Products for Industrial Homework

Certain items cannot be produced by industrial homework. These include:

- Articles of food or drink
- Articles for use in connection with the serving of food or drink
- Articles of wearing apparel
- Toys and dolls
- Tobacco, drugs and poisons
- Bandages and other sanitary goods

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[63] Lab. Code secs. 2650-2667

[64] Lab. Code sec. 2658

[65] Lab. Code sec. 2660

[66] Lab. Code sec. 2661

- Explosives, fireworks and articles of like character
- Other articles as prohibited by regulation[67]

Identification of Industrial Homework Products

Articles manufactured by industrial homework must have a label or other mark of identification conspicuously affixed to each article or material. This label must bear your name and address printed or written legibly in English. If this is impossible, the label must be displayed on the package or other container in which the goods are kept.[68]

Industrial Homework Violations

Negligent failure to prevent articles or materials under your custody or control from being taken to a home for manufacture by industrial homework is a misdemeanor.

Unlicensed employment of or use of an industrial homeworker or advertisement for industrial homework performance that is not permitted is a misdemeanor, with varying levels of punishment and fines depending on whether it is a first offense.

A person who does industrial homework without a valid permit is guilty of a misdemeanor. A first offense is punishable by a fine of not more than $50. A second offense is punishable by a fine of not more than $100. The court can suspend this fine under certain circumstances.[69]

Industrial Homework Records

Employers of industrial homeworkers must keep all of the following records and make them available for inspection:

- Full name and home address of each industrial homeworker that he/she employs.
- Amount and description of materials delivered to each industrial homeworker that he/she employs, with date of delivery and rate of compensation.
- Gross amount of compensation paid to each industrial homeworker that he/she employs and date of payment.
- Names and addresses of all agents or independent contractors who received materials or articles for manufacture by industrial homework, as well as the quantity, description of materials and date of delivery.
- Names and addresses of all manufacturers or independent contractors from whom he/she received articles or materials for industrial homework, as well as the quantity, description of materials and date of receipt.[70]

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[67] Lab. Code sec. 2651

[68] Lab. Code sec. 2663

[69] Lab. Code sec. 2660.5

[70] Lab. Code sec. 2665

Chapter 7

Employing Minors

Employment of minors is regulated under numerous authorities such as the California Labor Code, the Education Code and the federal Fair Labor Standards Act (FLSA). This section explains the employment of minors. It includes exceptions and restrictions, work permits, record keeping, wages and possible penalties when codes or laws are violated.

Child Labor Law Coverage

Almost all employees under the age of 18 are covered by California's child labor protections. Under the California Labor Code, "minor" means any person under the age of 18 years who is required to attend school under the provisions of the Education Code, and includes all minors under the age of six. With limited exceptions, all minors must have a work permit.

The California Labor Code entirely excludes any high school graduate under the age of 18 and not covered by the compulsory education laws, permit requirements, work hour restrictions and all occupational prohibitions. However, under federal regulations, high school graduates under 18 cannot be employed in an occupation prohibited to minors under 18 unless they also have completed a bona fide course of training in that occupation.[1]

School dropouts are covered by California's compulsory education laws and thus are covered by all state child labor requirements. Emancipated minors are covered by all California child labor laws, except that they can apply for a work permit without their parents' permission.[2]

Child Labor Exceptions for Parents and Guardians

Generally, when parents or guardians employ their minor children they must meet all of the child labor requirements that are imposed upon other employers, including obtaining work permits. Parents or guardians who employ their minor children in "manufacturing, mercantile or similar commercial enterprises" must obtain work permits.[3] This phrase is broadly construed to mean any business in which parents or guardians employ their children.

The only parent or guardian employers who are exempt from California child labor laws are those who employ their minor children in agriculture, horticulture, viticulture or domestic labor on or in connection with premises that the parent or guardian owns, operates or controls.[4] These parent or guardian employers are uniquely exempt from work permit requirements, most work hour restrictions and hazardous occupation prohibitions. Parents and guardians cannot employ minors in these exempted occupations during school hours, even if the minor is under school age.[5] Under federal law, minors employed on a farm owned or operated by his/her parent or guardian are exempt from the FLSA's child labor provisions, including hazardous occupations, but they cannot be employed in any mining or manufacturing occupation on the farm.[6]

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[1] 29 CFR sec. 570.50

[2] Family Code sec. 7050

[3] Educ. Code sec. 49141

[4] Lab. Code sec. 1394

[5] Lab. Code sec. 1394

[6] 29 U.S.C. 213(c)(1) and (2); 29 CFR sec. 570 Subpart E

The exemption for domestic labor does not mean a minor can be employed in the parent or guardian's home in an occupation otherwise prohibited. Domestic labor refers to the type of duties performed — that is, household duties — not the location where labor is performed. Minors cannot be freely employed to manufacture goods in their parents' home. They must be at least 16 and possess a homeworker permit issued by the Labor Commissioner, in addition to possessing a work permit issued by the minor's school.[7]

Similarly, under federal law, parents do not have carte blanche when they employ their own children. Parents or guardians cannot employ their minor children under 16 in mining or manufacturing, nor can they employ their children in the occupations declared hazardous for people under 18.[8] Under federal law, parents or guardians can employ their children under 16 in any other occupation. However, where state law imposes a more protective occupational standard, that standard applies to parent employers. State law does not permit parents or guardians to employ their underage children in prohibited occupations, except in agriculture on premises the parent or guardian owns, operates or controls.[9]

Parent or guardian employers in these particular industries are entirely exempt from both state and federal minimum wage and overtime pay requirements. Parents and guardians need not pay their employee children any wages at all.[10] The parent or guardian must be the owner of the business. If the business entity is a corporation, the minor is not directly employed by the parent and this exception does not apply.

Finally, parents and guardians have special liability for violations of certain child labor laws even when they are not the employer;[11] examples include activities dangerous to the health of the minor, begging, and working in entertainment without the required permit.

Record Keeping and Employing Minors

Prior to permitting a minor to start work, you must possess a valid *Permit to Employ and Work - Form B1-4*. The minor's school issues the permit. Generally, the minor obtains an application (*Minors - Statement of Intent to Employ and Request for Work Permit - Form B1-1*), completes it, has it signed by his/her parent and/or guardian and prospective supervisor, then returns it to the school. The school may then issue the permit. For more information, see "Work Permits for Minors" on page 123.

You must have a *Minors - Statement of Intent to Employ and Request for Work Permit - Form B1-1* on file with the school district of attendance for each minor required to attend school.[12] Every employer must have a *Permit to Employ and Work - Form B1-4* on file in the workplace for each minor.[13]

Minors - Statement of Intent to Employ and Request for Work Permit - Form B1-1

Permit to Employ and Work - Form B1-4

Keep records available at all times for inspection by school authorities and officers of the Division of Labor Standards Enforcement (DLSE).[14] Failure to produce a *Permit to Employ and Work - Form B1-4* is evidence of the illegal employment of minors and subjects you to a $500 fine for the first offense.[15]

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[7] Lab. Code secs. 2659, 2661

[8] 29 U.S.C. 20391(1) and (2); 29 CFR sec. 570 Subpart E

[9] Lab. Code sec. 1394

[10] IWC Wage Orders sec. 1; 29 U.S.C. 203(s)(2)

[11] Lab. Code secs. 1308, 1308.5

[12] Educ. Code sec. 44901

[13] Lab. Code sec. 1299; Educ. Code sec. 49161

[14] Lab. Code sec. 1299; Educ. Code secs. 49161, 49164, 49181

[15] Lab. Code secs. 1304, 1288; Educ. Code sec. 49181

You must keep a record showing the names, ages, dates of birth and addresses of all minors employed, and time and payroll records required by the applicable Industrial Welfare Commission (IWC) Wage Order for three years. You must furnish this information when requested.[16]

The student-learner program is for high school students of at least 16 years of age who are enrolled in vocational education courses. If you employ student-learners, you must keep a copy of the written agreement with the minor's other employment records.[17]

Minors are covered by all record keeping requirements related to payment of wages. At the time you pay wages, you must furnish each of your employees a separate or detachable itemized statement of deductions.[18]

Farm Employer Postings About Minors

If you are the owner, tenant or operator of a farm that employs parents who have minor children in their immediate care or custody, you must post an additional notice. This notice must state that the minor children are not allowed to work unless legally permitted and unless the proper work permits have been secured. You must post this notice in a conspicuous place on the property or place of employment, where it can be easily read. You must furnish your own notice, which must be printed in both English and Spanish.[19]

For more information, see "Posters" in Chapter 2, page 5.

Door-to-Door Sales Registration and Minors

If you employ minors under 16 in door-to-door sales more than 10 miles from the minor's residence, you must register with the Labor Commissioner. Among other requirements, you must identify the organization, organization's officers, employer identification (ID) number and all individuals employed to transport or in any way supervise, accompany, recruit, solicit, hire, furnish, employ, pay or otherwise direct or measure the minors' work. The Labor Commissioner issues registration cards that the minor must carry at all times. The initial fee is $350; the annual renewal fee is $200.[20]

Transporters and supervisors must register separately and individually. Registration cards are issued and must be carried at all times. The initial fee is $100; the annual renewal fee is $50.[21]

Among other requirements, all applicants — whether employer, transporter or supervisor — must submit two sworn affidavits of character, a personal record and a set of fingerprint cards. All applicants must describe the method and level of adult supervision, the merchandise to be sold or distributed and promotional statements the minor will deliver. You must describe how the sales operation will be presented to the public. All applicants must identify all vehicles used to transport minors. All applicants must present proof of liability insurance.[22]

You are bound by these registration requirements for minors' door-to-door sales if you employ minors to deliver newspapers to consumers. Any violation of the laws protecting minors is grounds for suspension, revocation or refusal to renew any registration.[23]

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[16] Lab. Code secs. 1174, 1175
[17] Lab. Code sec. 1295
[18] Lab. Code sec. 226
[19] Educ. Code sec. 49140
[20] Lab. Code sec. 1308.3
[21] Lab. Code sec. 1308.2
[22] Lab. Code secs. 1308.2, 1308.3
[23] Lab. Code sec. 1308.4

All applications for registration are subject to investigation. All statements on an application are subject to a penalty for perjury. Any false statement on an application is grounds for non-issuance, suspension or revocation of a registration and a felony.[24]

Exceptions to Door-to-Door Sales Registration Requirements

You are not bound by these registration requirements if you are:

- The parent or guardian of the minor
- A person acting on behalf of a bona fide trustee of charitable assets or on behalf of a charitable organization
- Part of a government agency, including schools
- Part of any religious corporation or organization that holds property for religious purposes or any officer, director or trustee who holds property for like purposes
- Part of a bona fide cemetery corporation
- Part of a bona fide political committee
- Part of a bona fide charitable corporation organized and operated primarily as a religious organization, educational institution, hospital or a licensed health care service plan[25]

Employment Restrictions for Minors

Employment in certain industries, such as entertainment and agriculture, is covered by different requirements than most other industries.

Basic Provisions and Regulations - Child Labor Laws

Employing Minors Checklist

Employing Minors Under 14

The FLSA prohibits employment of minors under the age of 14 except in certain limited occupations. These occupations include certain agricultural firms, the entertainment industry, newspaper delivery, homeworkers in the making of certain wreaths and employment on a farm owned or operated by a parent or guardian.

Minors Working in Hazardous Occupations

Both state and federal law prohibit minors from working in certain hazardous occupations.

These occupations are explained in the Basic Provisions and Regulations - Child Labor Laws form.

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[24] Lab. Code secs. 1308.2, 1308.3, 1308.4

[25] Lab. Code sec. 1308.2(f); Govt. Code secs. 12582, 12582.1, 12583

Minors Driving on Public Highways and Streets

It is important to remember that you cannot employ minors for the purpose of driving a motor vehicle on public highways and streets.[26] This includes delivering any type of goods from a motor vehicle.[27]

Work Permits for Minors

With certain limited exceptions, you must acquire the required work permits before employing a minor. Permits are required year-round, even when school is not in session.[28] A work permit limits the maximum number of work days and hours allowed for the minor and the spread of hours permitted. The spread of hours is the earliest time a minor can start work and the latest time he/she can end work each day. The permit can also contain limitations on other aspects of the minor's work. The back of the work permit contains a summary of restricted occupations based on a minor's age and legal restrictions on hours of work.

Obtaining and Completing the Necessary Permits for Minors

Work permit laws require two forms that must be obtained and completed before employment begins. To obtain these forms, contact the Office of the Superintendent of the school district in which the minor attends school.

Employing Minors Checklist

If you're considering hiring a minor, you and the minor must complete the first form, known as a *Minors - Statement of Intent to Employ and Request for Work Permit - Form B1-1*. The minor must complete *Form B1-1*, then you and the minor's parent or guardian must sign it.[29]

After you file a *Form B1-1* with a school district, the superintendent of each school district has the authority to issue the second form, known as a *Permit to Employ and Work - Form B1-4*.[30] This responsibility is often delegated to other school district officials who take into consideration a minor's health, education and welfare before issuing a permit. Neither school nor labor officials can waive any established minimum labor standard for minors. The issuing authority can revoke a work permit if he/she determines that the employment is impairing the health or education of the minor.[31]

The *Permit to Employ and Work - Form B1-4* specifies:

- The maximum number of hours of work per day when school is in session
- Other limitations
- The permit's expiration date

Minors - Statement of Intent to Employ and Request for Work Permit - Form B1-1

Permit to Employ and Work - Form B1-4

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[26] Vehicle Code sec. 12515

[27] 29 CFR sec. 570.52(b)(6)

[28] Educ. Code sec. 49160; Lab. Code sec. 1299; 29 CFR sec. 510.9

[29] Educ. Code sec. 49163

[30] Educ. Code sec. 49110

[31] Lab. Code sec. 1300; Educ. Code secs. 49164, 49116

Special Minor Permit Circumstances

A minor employed in the entertainment industry must have an Entertainment Work Permit issued by the DLSE.[32] You must have a *Permit to Employ Minors in the Entertainment Industry*, which the DLSE also issues.[33] You can find the procedures for obtaining an *Entertainment Work Permit* on the DLSE website at www.dir.ca.gov/DLSE/Form-EntertainmentWorkPermit.pdf.

Prior to the first employment of a minor performer, a temporary, 10-day permit may be issued under specific circumstances.[34] Prior to issuing a temporary permit for an infant under the age of one month, a certification must be made by a pediatric physician.

Minors visiting from another state (or country, if eligible to work in the United States) who want to work in California must have a work permit.[35] The local school district in which the minor resides while visiting issues these permits.[36]

Minor Permit Expiration Dates

Permits issued in one school year expire five days after a new school year begins.[37] In California, the school year begins July 1 and ends June 30.

Exceptions for Requiring Permits for Minors

Permits are not required for:

- Any minor who is a high school graduate or who has been awarded a Certificate of Proficiency[38]

Minors should provide some proof of age and parental authorization to work. The *Statement of Intent to Employ and Request for Work Permit* can be used for this purpose.[39]

- Minors who irregularly work at odd jobs, such as yard work and babysitting in private homes where the minor is not otherwise regularly employed[40]
- Minors who are at least 14 years of age and employed to deliver newspapers to consumers[41]
- Minors who work for a parent or guardian in agriculture, horticulture, viticulture or domestic labor on or in connection with property the parent or guardian owns, operates or controls[42]

Note that these minors cannot be employed during school hours, even when they are under school age.[43]

- Minors of any age who participate in any horseback riding exhibition, contest or event, if they receive payment for services or prize money[44]
- Self-employed minors

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[illegible]
[illegible]
[illegible]

- Minors directly employed by state and local agencies, unless explicitly included in the state's Labor Code. The FLSA covers state and local agencies. These agencies must meet all its requirements[45]

Workers' Compensation and Minors

Minors requesting work permits must have the name of your workers' compensation carrier on their *Minors - Statement of Intent to Employ and Request for Work Permit - Form B1-1*. If minors enrolled in work experience education programs receive pay for their work, you must carry workers' compensation insurance for them. In the case of minors not paid for their work in work experience education programs, workers' compensation insurance must be carried by the school district.

Minors - Statement of Intent to Employ and Request for Work Permit - Form B1-1

Working Hours for Minors

The total number of hours a minor can work and the permitted spread of hours, varies depending on the age of the minor and the time of year in which work will be performed. With specific exceptions, it is a misdemeanor to require any minor to work more than eight hours a day.[46]

The *Basic Provisions and Regulations - Child Labor Laws* form was taken from the *Child Labor Law* pamphlet issued by the DLSE, a division of California's Department of Industrial Relations (DIR). Note that wherever state and federal standards overlap or appear to contradict, the more protective standard always applies.

Basic Provisions and Regulations - Child Labor Laws

Note that if a minor works two jobs, both jobs together cannot total more than the legal number of hours for the minor's age group and circumstance.

Extended Working Hours for Minors

Minors working in certain industries can work extended hours under permits issued by the Labor Commissioner. Contact the DLSE to obtain an application.

Minors Working at Professional Baseball Games

Minors ages 14 and 15 can work at professional baseball games until 12:30 a.m. during any evening preceding a non-school day, and until 10:00 p.m. any evening preceding a school day. When school is in session, 14- and 15-year-olds can work a maximum of five hours per day and 18 hours per week as professional baseball sports attendants. When school is not in session, they can work a maximum of 40 hours per week.[47]

School authorities who issue the minor's work permit must monitor the academic achievement of the minor to ensure that his/her educational progress is being maintained or improved during the period of employment.[48]

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[45] 29 U.S.C. 203(s)(1)

[46] Lab. Code sec. 1392

[47] Lab. Code sec. 1295.5

[48] Lab. Code sec. 1295.5

Minors Working in Agricultural Packing Plants

Sixteen- and seventeen-year-olds employed in agricultural packing plants during the peak harvest season can work up to 10 hours on any day school is not in session. Before you schedule a minor for a shift of more than eight hours, you must obtain a special permit from the Labor Commissioner. This permit will be granted only if it does not materially affect the safety and welfare of minor employees and will prevent you undue hardship. The Labor Commissioner can require an inspection of a packing plant prior to granting the permit. A permit can be revoked after reasonable notice is given in writing, or immediately if any of its terms or conditions are violated. The Labor Commissioner provides applications for permits. You must post a copy of the completed application at the place of employment at the time the application is submitted.[49]

Lake County Agricultural Packing Plant Exemption

Sixteen- and seventeen-year-olds who work in agricultural packing plants in Lake County, California, are exempted from the normal working hours limitations. These minors, if enrolled in public or private school in Lake County, can work between 48 and 60 hours per week under an exemption issued by the state Labor Commissioner with prior written approval of the Lake County Board of Education.[50] This exemption is set to be repealed on January 1, 2017.

As a condition of receiving an exemption or a renewal of an exemption, you must, on or before October 1 of each year, file a written report to the Labor Commissioner containing all of the following information about the payroll for the same year, up to September 15:

- The number of minors employed
- A list of the age and hours worked on a weekly basis of each minor employed

Prior to issuing or renewing an exemption, the Labor Commissioner must inspect the agricultural packing plant.

Wages for Minors

You cannot pay minors who have graduated from high school or have a Certificate of Proficiency less than adult employees in the same establishment for the same quantity and quality of work. However, differences in pay can be based on seniority, length of service, ability, skills, difference in duties or services performed, difference in the shift or time of day worked, hours of work or other reasonable differentiation exercised in good faith.[51]

You can, in limited circumstances, pay minors less than the minimum wage. Both state and federal law regulate these subminimum wages. The federal opportunity wage now allows you to pay a subminimum rate to individuals under the age of 20 for the first 90 consecutive calendar days of employment. State law allows you to pay learners 85 percent of the minimum wage rounded to the nearest nickel, but not less than $8.50 per hour. The overlapping of the state and federal standards severely limits the payment of subminimum wages in California. For a thorough discussion of the subminimum wages that California employers can pay to minors and the restrictions that apply, see "Subminimum Wages" in Chapter 11, page 249.

Always check with legal counsel before paying subminimum wages.

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[49] Lab. Code [illegible]

[50] Lab. Code [illegible]

[51] Lab. Code sec. [illegible]

Minors Working as Apprentices

You can pay apprentices at subminimum rates, but only in accordance with federal standards.[52] For the rules about paying subminimum rates, see "Subminimum Wages" in Chapter 11, page 249. For information on interns, see "Interns" in Chapter 6, page 110.

Minors Working at Organized Camps

You can pay organized camp student employees, camp counselors or program counselors, regardless of age, a weekly salary amounting to 85 percent of the minimum wage for a 40-hour week, regardless of the number of hours worked per week.[53] If individuals employed in these occupations work fewer than 40 hours per week, you must pay them at least 85 percent of the minimum wage for each hour worked.

State law defines an "organized camp" as a site with program facilities established for the primary purposes of providing an outdoor group living experience with social, spiritual, educational or recreational objectives for five days or more during one or more seasons of the year. The term does not include a motel, tourist camp, trailer park, resort, hunting camp, auto court, labor camp, penal or correctional camp, child care institution, home-finding agency or any charitable or recreational organization operating a special (for example, temporary) occupancy trailer park.[54] The organized camp must meet the standards established by the American Camping Association.

The FLSA also exempts employees of organized camps, amusement or recreational establishments and religious or nonprofit educational conference centers from minimum wage and overtime requirements if one of the following conditions is met:

- The facility does not operate for more than seven months in any calendar year
- Its average receipts for any six months of the preceding year do not exceed 33.3 percent of the receipts for the remaining six months of the preceding year

However, private entities providing services or facilities in a national park, national forest or national wildlife refuge are not exempt from federal wage requirements, unless the services or facilities relate to skiing.[55]

Penalties for Incorrectly Employing Minors

If you employ or permit underage minors to work in a prohibited occupation or hazardous duty — no matter how voluntary the act is on the part of the minor — you are liable for Class A penalties. For more information, see "Civil Penalties for Incorrectly Employing Minors" on page 128. Even minors who regard themselves as self-employed cannot engage in these prohibited activities. Also, a client who permits a minor to engage in the prohibited activity is liable for Class A penalties. This type of liability also extends to underage employment in any of the federally regulated occupations adopted by California. For example, minors under 16 cannot be employed or permitted to work in occupations involving mining, manufacturing or processing or perform any duties in related workrooms.[56] Minors under 14 cannot be employed or permitted to work in clerical or food service occupations.[57]

Owners of real property who knowingly benefit from child labor violations are subject to all applicable civil penalties, regardless of whether the person is the minor's employer.[58]

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[52] IWC Wage Orders sec. 4; 29 U.S.C. 214; 29 CFR sec. 521.5

[53] Lab. Code sec. 1182.4

[54] Health and Safety Code sec. 18897

[55] 29 U.S.C. 213(a)(3)

[56] Lab. Code secs. 1294.1, 1290

[57] Lab. Code sec. 1294.3

If a garment manufacturer commits two violations involving child labor, minimum wage, maximum hours of labor or a combination of these within a two-year period, then the Labor Commissioner can require them to post a surety bond. If a subsequent violation occurs within a two-year period, the Labor Commissioner can suspend a garment manufacturer's registration for up to one year and confiscate any partially or fully assembled garments.[59]

Minor workers are also protected just like other workers by state labor, employment and civil rights laws and an employer can be liable for violations of these laws.

New 2016

A law effective in 2016 clarifies that a child worker's immigration status is not relevant to the issue of whether the employer violated the law or what remedies are available to the worker (unless the remedy is directly prohibited by federal law).

Civil Penalties for Incorrectly Employing Minors

Violations of child labor laws carry serious penalties. California law provides two types of civil penalties for violations of child labor laws: Class A and Class B.[60]

The statute of limitations for claims that arise from violations of employment laws while someone is a minor is tolled, in other words, delayed or suspended until the minor is 18 years of age. In addition, treble damages are allowed if an individual is discriminated against or retaliated against because he/she filed a claim or civil action alleging a violation of employment laws that occurred while he/she was a minor.[61]

Class A Violations of Child Labor Laws

The more severe violations, Class A, generally involve underage employment in hazardous occupations. Class A violations include violations of laws relating to:

- Manufacturing and underage employment[62]
- Hazardous occupations[63]
- Door-to-door sales[64]
- Eight-hour days[65]
- Hazardous activities[66]
- Any other violations that the DIR's director determines present an imminent danger to minor employees or a substantial probability that death or serious physical harm would result[67]

The violation of work hour limitations[68] for the third or subsequent occasion also constitutes a Class A violation.[69] Class A violations incur penalties of not less than $5,000 and up to $10,000 for each and every violation.[70]

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58. Lab. Code sec. 1301
59. Lab. Code sec. 2679(b)
60. Lab. Code sec. 1288
61. Lab. Code sec. 1311.5
62. Lab. Code sec. 1290
63. Lab. Code secs. 1292, 1293, 1293.1, 1294, 1294.1, 1294.5, 13[illegible]
64. Lab. Code sec. 1308.1; 8 CCR sec. 11706
65. Lab. Code sec. 1392
66. 8 CCR secs. 11701, 11703, 11707
67. Lab. Code sec. 1288; 8 CCR sec. 11780
68. Lab. Code sec. 1391
69. Lab. Code sec. 1288

If the class A violation involves a minor 12 years of age or younger, the penalty will be at least $25,000 and up to $50,000 for each and every violation.[71]

Class B Violations of Child Labor Laws

Class B violations include violations of laws relating to:

- Work permits[72]
- The entertainment industry[73]
- Other violations that the DIR's director determines have a direct or immediate relationship to the health, safety or security of minor employees other than Class A violations[74]

The violation of work hour limitations[75] is a $500 Class B violation upon the first violation and a $1,000 Class B violation on the second violation.[76] Class B violations carry civil penalties of not less than $500 and up to $1,000 for each and every violation.[77] In addition, you can be liable for civil penalties for failure to:

- Pay the applicable minimum wage[78]
- Carry workers' compensation insurance[79]
- Provide a written deduction statement[80]

Federal Penalties for Violating Child Labor Laws

The US Department of Labor updated the federal Minimum Wage poster (07/09) to include information on civil penalties available under federal law for violation of child labor laws. The penalties include up to $50,000 for each child labor violation that causes the death or serious injury of any minor employee. The amount can be doubled up to $100,000 if the violations are determined to be willful or repeated. In addition, you can be assessed civil penalties of up to $1,100 for each willful or repeated violation of the minimum wage or overtime pay provisions of federal law. You can also be assessed civil penalties up to $11,000 for each employee who is subject to the child labor provisions and for whom a violation occurs.

Criminal Penalties for Violating Child Labor Laws

Criminal violations of child labor laws are misdemeanors punishable by fines ranging up to $10,000, or by confinement in the county jail for periods of up to six months or by both fine and imprisonment.[81]

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[70] Lab. Code sec. 1288

[71] Lab. Code sec. 1311.5

[72] Lab. Code sec. 1299

[73] Lab. Code sec. 1308.5

[74] Lab. Code sec. 1288; 8 CCR sec. 11782

[75] Lab. Code sec. 1391

[76] Lab. Code sec. 1288

[77] Lab. Code sec. 1288(b); 8 CCR secs. 11781, 11781.1

[78] Lab. Code sec. 1197.1

[79] Lab. Code sec. 3722

[80] Lab. Code sec. 226

[81] Lab. Code secs. 1175, 1199, 1303, 1308, 1308.2, 1308.3, 1308.5, 1391, 1392, 1308.7, 1309, 1309.5; Educ. Code secs. 48454, 49182, 49183

Personnel Records and Privacy

Workplace privacy is an important and growing concern for business. It is often difficult to sort through and understand privacy issues, considering the multitude of federal and state constitutional guarantees, limitations imposed by federal and state statutes, and case law. In addition, technology expands both employer and employee concerns about privacy rights.

This section explains the law and gives you the information to understand the issues and make sound, informed decisions respecting your employee's rights while understanding your own rights. This knowledge will enable you to operate your business more effectively. This section thoroughly discusses all aspects of workplace privacy, including:

- Constitutional law — the basis for the right to privacy.
- Keeping employee information private — your obligations to your employees to protect their privacy.
- Employee access to personnel records — employee rights to view, copy or receive information on themselves from your files.
- Types of employment testing — for example, drug and polygraph tests, and if you can require applicants or employees to take tests.
- Credit reports and background investigations — the legal restrictions and procedures you must follow when gathering information on applicants and employees.
- Employee monitoring — the extent of your right to know what goes on in your workplace.
- Medical records — including Health Insurance Portability and Accountability Act (HIPAA) requirements and other federal and state safeguards for employee health information.
- Records retention — the type of records you must keep and how long you must keep them.

Constitutional Privacy Protections

The right to privacy is not specifically enumerated in the U.S. Constitution. However, in *Griswald v. Connecticut*, the U.S. Supreme Court ruled that a right to privacy was explicit in the Bill of Rights, which prohibits various types of unreasonable government intrusion into personal freedom.[1] Because this case specifically relates to government intrusion upon personal freedom, private employers are not covered by federal constitutional restrictions.

However, California is one of seven states that provides a constitutional right to privacy. Article 1, Section 1, of the California Constitution provides that: *All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy.*

In *White v. Davis*, the California Supreme Court stated that this privacy provision is directed at the overly broad assemblage and retention of unnecessary personal information by government and business, the improper use of information obtained for a specific purpose and the lack of a reasonable check on the accuracy of existing records.[2]

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[1] *Griswald v. Connecticut*, 381 U.S. 479 (1965)

[2] *White v. Davis*, 13 Cal. 3d 757 (1975)

Common-Law Privacy Claims

In addition to statutory claims, employees can bring common-law claims against you for invasion of privacy. If you disseminate information obtained privately from the employee, you could be subject to claims of having placed the employee in a false light or giving unreasonable publicity to that employee's personal life.

The following are some common-law causes of action that involve intrusion into an individual's privacy. Each of these privacy violations can arise in the workplace.

- Appropriation of the name and likeness of another
  - **Example:** Using photographs or names of employees in your advertising or marketing, particularly of former employees without their permission, can result in a claim for appropriation.
- Unreasonable publicity given to another's private life
  - **Example:** Telling others that an employee is suffering from AIDS or is recently divorced gives unreasonable publicity into that employee's private life.
- Unreasonable intrusion upon the seclusion of another
  - **Example:** Surveillance of an applicant for a sensitive position during a background check can lead to claims for unreasonable intrusion into the employee's seclusion (privacy).
- Publicity that unreasonably places a person in a false light before the public
  - **Example:** Publicizing sensitive facts about an employee can place that employee in a false light; for example, telling a group of employees that another employee was fired for dishonesty when the employee resigned with no proof of dishonesty.

Keeping Employee Information Private

You can gather a variety of information about applicants for employment. Once employed, additional information accumulates about the employee's performance, health, family and other personal issues. Growing concern over the possession of this data has contributed to development of laws governing the privacy of employer records.

For privacy reasons, files related to employee financial matters, such as wage assignments, garnishments, credit inquiries and so forth, must be kept in a confidential file separate from an employee's personnel file. Access to this confidential file should be granted only to those people in your organization who have a legitimate need to know the information.

Keeping Personnel Records Private

Improperly releasing personnel information can result in liability. The right to privacy guaranteed by the California Constitution protects employee personnel files from improper disclosure to third parties.[3] An employee can waive the privacy of his/her own personnel records by authorizing the release of personnel information to a third party, such as his/her union.[4] When a former employee sues you for wrongful discharge, failure to promote, a disciplinary action or other employment decision, the court generally holds that the employee has placed his/her employment history at issue, thereby waiving the right to privacy for his/her personnel records for purposes of the lawsuit.

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[3] *Board of Trustees, Stanford University v. Superior Courts*, 119 Cal. App. 3d 516 (1981)

[4] *New Jersey Bell Telephone Company v. NLRB*, 720 F.2d 789 (3rd Cir. 1983)

You have a number of potential liabilities for improperly releasing personnel information. For example, you cannot make misrepresentations about a former employee to prevent or attempt to prevent him/her from obtaining employment.[5] You can make a truthful statement about the reason for a former employee's discharge or voluntary termination. However, exercise caution. If your statement is not in response to a request or is accompanied by marks or symbols that convey information contrary to the statement, that action is considered misrepresentation.[6] Even when your response to a prospective employee's appropriate request is truthful and accurate, liability can arise if that response is adverse and in reprisal for the employee's exercise of the right to file a claim under employment laws.[7]

You can also be liable for inaccurate or misleading information about an employee on the basis of defamation or interference with prospective economic advantage. Defamation is an unlawful invasion of an individual's interest in maintaining a favorable reputation. It encompasses communications that have a tendency to injure a person in his/her occupation. Unlawful interference with prospective economic advantage can occur when a prospective employer decides not to hire an employee based on false statements or inappropriate facts disclosed by a former employer.[8]

Before releasing personnel information, see "Responding to Reference Checks" on page 183.

For information on an employee's right to access his/her own personnel information, see "Access to Personnel Files" on page 142.

Keeping Medical Information Private

California law mandates that you establish appropriate procedures to keep all employee medical records and information confidential and protect them from unauthorized use and disclosure. Failing to establish these procedures is a misdemeanor and allows an employee to collect monetary damages, attorneys' fees and the costs of litigation.[9]

Under state statutes, you cannot use or disclose medical information pertaining to your employees without a written authorization from the affected employee.[10] This prohibition includes knowingly permitting an employee to use or disclose another employee's medical information.

Discussing an employee's private medical information with other employees who do not have a need to know the information can also lead to claims of invasion of privacy.

Case law highlights the need to limit the disclosure of sensitive medical information.

However, medical information can be disclosed in limited circumstances:

- When compelled by a court of law or by a lawsuit filed by an employee
- When used for administering and maintaining employee benefit plans
- In relation to a workers' compensation claim or request for medical leave[11]

You are not liable for any unauthorized use of the medical information by the person or entity to which you disclosed the information if you have attempted, in good faith, to comply with these medical privacy laws.[12]

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[5] Lab. Code secs. 1050, 1052

[6] Lab. Code sec. 1053

[7] *Dunlap v. Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977)

[8] *Buckaloo v. Johnson*, 14 Cal. 3d 815 (1975)

[9] Civ. Code sec. 56.35

[10] Civ. Code sec. 56.20(c)(1)

[11] Civ. Code sec. 56.20(c)(2)

[12] Civ. Code sec. 56.23

You cannot discriminate against an employee who refuses to sign an authorization releasing medical records.[13] However, the law does not prohibit you from taking necessary action in the absence of medical information due to the employee's refusal to sign a medical release authorization.[14]

For example, if you are unable to ascertain an employee's physical ability to perform a job function due to the employee's refusal to sign an authorization, including a test to evaluate alcohol or drug usage based on reasonable suspicion, you have the right to discipline an employee based on the information available.

Authorization for an employer to disclose medical information is valid if it meets all of the following criteria:

- Handwritten by the employee/patient who signs it or is in typeface no smaller than 14-point type
- Clearly separate from any other language on the same page
- Signed only to authorize release of medical information and for no other purpose
- Signed and dated by the employee/patient or a legal representative if the employee/patient is a minor or the representative of a deceased employee/patient[15]

An employee who signs an authorization to release medical information is entitled to a copy of the release at his/her request.[16] The release can be canceled or modified at any time, effective upon written notice to you.[17]

Establish a confidential file for each employee that contains information related to the employee's medical issues. Keep it separate from the regular personnel files and grant access only to those with a legitimate need to know the information.

A supervisor who is considering a particular employee for a promotion to a clerical position in another department probably has no need to know information on that employee's employment physical. But if the position to which the employee will be promoted requires heavy lifting, records from the employment physical may be necessary to assess the individual's restrictions or necessary accommodations.

Also, make certain that you comply with all leave laws, such as family and medical leave or pregnancy disability leave laws, relating to obtaining medical information.

Electronic Health Records

Electronic health records must be protected. If you keep electronic medical information, you must comply with these requirements:

- Protect and preserve the integrity of electronic medical information.
- Automatically record and preserve any change or deletion of any electronically stored medical information. The record of any change or deletion must include the identity of the person who accessed or changed the medical information, the date and time the medical information was accessed and the change that was made to the medical information.

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[13] Civ. Code sec. 56.20(b)
[14] Civ. Code sec. 56.20(b)
[15] Civ. Code sec. 56.21
[16] Civ. Code sec. 56.22
[17] Civ. Code sec. 56.24

Genetic Information Nondiscrimination Act (GINA)

GINA prohibits the use of genetic information, including family history, to make decisions about health insurance and employment, and restricts the acquisition and disclosure of genetic information. Title II of GINA represents the first legislative expansion of the EEOC's jurisdiction since the Americans with Disabilities Act (ADA) of 1990.

Congress enacted GINA in response to concerns that individuals would decline to take advantage of the increasing availability of genetic testing out of concern that they could lose their jobs or health insurance if tests revealed adverse information.

GINA covers private employers with 15 or more employees. GINA generally prohibits employers from requesting, requiring or purchasing an applicant's or employee's genetic information, even if the employer never uses that information. Title II of GINA prohibits employment discrimination based on genetic information and restricts the acquisition and disclosure of genetic information.

The U.S. Equal Employment Opportunity Commission (EEOC) issued final regulations implementing the employment provisions (Title II) of the Genetic Information Nondiscrimination Act of 2008 (GINA).

According to the EEOC, "genetic information" includes:

- Information on an individual's genetic tests
- Information on the genetic tests of a family member
- Family medical history
- Requests for and receipt of genetic services by an individual or a family member
- Genetic information on a fetus carried by an individual or family member
- Genetic information on an embryo legally held by the individual or family member using assisted reproductive technology

For instance, the EEOC settled a lawsuit involving a company that requested family history information as part of its post-offer/pre-employment medical exams of applicants. Such actions violate GINA.

The EEOC published detailed information on GINA and its final regulations, including one question and answer document aimed at helping small businesses comply with the law. You will also find information on the interaction between GINA and employee wellness programs. For more information, visit the EEOC website at www.eeoc.gov/laws/types/genetic.cfm.

In 2015, the EEOC published proposed regulations relating to employers' wellness incentive programs and limitations on gathering protected information.

California Protections for Genetic Information

California enacted legislation that clarifies the extent of the protection of genetic information in California. The legislation amends the Fair Employment and Housing Act (FEHA) to state that employers are prohibited from discriminating against employees on the basis of genetic information.[18] The legislation further amends the Unruh Civil Rights Act, which generally prohibits business establishments from discriminating on specified bases to include genetic information as one of the protected basis. The legislation also expands the bases upon which a health facility may not discriminate in the provision of emergency services.

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[18] Govt. Code sec. 12940

The anti-discrimination provisions of FEHA apply to employers who employ five or more persons, compared with the federal scope that is limited to employers with 15 or more employees.

Under the state law, genetic information means information about any of the following:

- The individual's genetic tests
- The genetic tests of family members of the individual
- The manifestation of a disease or disorder in family members of the individual.

Genetic information includes: any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.

Genetic information does not include information about the sex or age of any individual.[19] For more information, please see "Discrimination on the Basis of Genetic Characteristics or Genetic Information" in Chapter 28, page 830.

Keeping Other Protected Medical Records Private

Records protected under state and federal privacy laws encompass more than a physician's report or the lab results from a drug test. Medical records can include:

- Family and medical leave request forms if an employee voluntarily discloses the nature of his/her illness on this form
- Return to work releases
- Workers' compensation records
- Information on disabilities being accommodated under the ADA or California's Fair Employment and Housing Act (FEHA)
- Other records that relate in any way to an employee's medical history

The ADA and FEHA also require that you maintain an applicant's or employee's medical history information on separate forms, treated as confidential and kept in separate files from the employee's general personnel information.[20] You can disclose information only if:

- Supervisors need information about necessary restrictions or accommodations for work duties.
- First aid personnel might require the information to administer emergency treatment.
- Government officials, investigating ADA or FEHA compliance, request the information.[21]

Keeping Credit Information Private

California law restricts the dissemination of credit information to an employee's creditors who contact you.[22] Although you can respond to requests to verify employment dates and job duties, only respond to third parties with employment information if a written release explicitly identifies the information to be disclosed and authorizes you to disclose it. To prevent inappropriate disclosures, require that requests for information be made in writing. Decline to answer questions relating to an employee's prospects for future or continued employment, citing organization policy as the reason.

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[19] Govt. Code sec. 12926

[20] 42 U.S.C. 12112(c)(3)(B)

[21] 29 U.S.C. 12112(c)3(B)

[22] Civ. Code sec. 1785.20.5

Consumer credit reporting agencies that furnish reports for employment purposes cannot report information on the age, marital status, race or creed of any consumer.[23]

California law generally prohibits the use of credit reports for employment purposes. For more information, see "Obtaining Applicant and Employee Credit Reports" on page 150. If you meet one of the exceptions for using a credit report, you must provide written notice to the consumer before requesting that report. You must send the consumer a free copy of the report if he/she requests it.[24]

In addition, you cannot discriminate against an employee or job applicant in employment solely because the individual has filed for bankruptcy.[25]

As a general rule, financial records are considered private records. Keep them in a confidential file separate from the employee's personnel file.

Considering Personal Relationships and Off-Duty Conduct

California law prohibits you from discriminating on the basis of marital status.[26] You do have the right when employing a married couple to refuse to place both spouses in the same department, division or facility if the work involves potential conflicts of interest or other hazards that are greater for married couples than for other people.[27]

Avoid intruding into and basing employment decisions on employees' non-marital personal relationships. As a general rule, avoid inquiry into an employee's off-duty activities in these areas, particularly in the absence of any showing of effect upon the employee's work performance.

However, an employer can try to limit its potential liability for problems that may arise from consensual relationships that occur between employees in the workforce. The concern for employers is that if and when the relationship goes bad, one of the employees may bring a claim for sexual harassment or discrimination. This concern is heightened when the relationship is between a supervisor and a subordinate. For more information, see "Romantic Relationships and Favoritism" in Chapter 27, page 788.

Consensual relationship agreements are one tool employers can use to minimize the potential for discrimination or harassment claims and to minimize disruption in the workplace. The agreement will essentially provide that company policy prohibits employees from using their authority to induce a nonconsensual relationship. The agreement should provide that consensual relationships should not cause disruption in the workplace or lead to sexual conduct in the workplace.

The agreement asks the employees to acknowledge that the relationship is voluntary and consensual and that they will abide by all company policies, including policies prohibiting discrimination, harassment, unprofessional conduct, conflict of interests and favoritism. Employers may wish to consult with legal counsel prior to implementing such policies.

Consensual Relationship Agreement

You cannot discriminate against employees on the basis of their sexual orientation.[28] Even before statutory prohibitions were enacted, courts in California ruled that discharging an employee based on sexual orientation alone constitutes a violation of the employee's right to privacy.[29] You may not discriminate on the basis of lawful conduct that employees engage in during nonworking hours and off premises.[30] For more information, see "Lawful Conduct Outside of Work and Discrimination Protections" in Chapter 26, page 751.

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[23] Civ. Code sec. 1785.18(c)

[24] Civ. Code secs. 1785.18, 1785.20.5

[25] 11 U.S.C. 525

[26] Govt. Code sec. 12940(a)

[27] Govt. Code sec. 12940(a)(3)

[28] Govt. Code sec. 12940

In *Medina Rene v. MGM Grand Hotel, Inc.*, the Ninth Circuit Court of Appeals also ruled that under certain circumstances, harassing an employee because of sexual orientation violates Title VII of the federal Civil Rights Act.[31]

Use caution in imposing discipline for an employee's off-duty conduct where the discipline is based on the employee's romantic or social activities.[32]

Considering Political Affiliation

You cannot adopt or enforce any policy that tends to control or direct employees' political activities or affiliations. You cannot coerce or influence employees to follow or refrain from following any particular line of political activity by threatening a loss of employment.[33]

Employee Illiteracy

You must make all reasonable efforts to safeguard the privacy of the employee who discloses a problem with illiteracy.[34] The employee who discloses a problem of illiteracy and who satisfactorily performs his/her job cannot be subject to termination because of the disclosure of illiteracy.[35]

Though illiteracy is not a disability, employers with 25 or more employees must reasonably accommodate and assist an employee who reveals a problem of illiteracy and requests assistance.[36] The law does not require you to provide a leave of absence for someone who requires assistance in enrolling in an adult literacy education program.[37]

Assistance might include providing the employee with the locations of local literacy education programs or arranging for a literacy education provider to visit the workplace.[38] If an employee needs time off from work to attend classes or seek other assistance, and that time off does not impose an undue hardship on you, strongly consider providing the time off from work.

The time off can be unpaid for nonexempt employees, although they could use any vacation or PTO available to them. An exempt employee must be paid for any day in which he/she performs any work, but deductions can be made from their salary for a complete day of absence. When absent for a complete day, the exempt employee could use any vacation or PTO available. Time off to seek literacy assistance should not impact the employee's benefits or right to return to work. If you require the use of paid time off, notify the employee of this requirement and maintain a policy that requires the use of paid time off for all types of absences.

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[29] *Gay Law Students v. Pacific Telephone & Telegraph*, 24 Cal. 3d 458 (1979)

[30] Lab. Code sec. 96(k)

[31] *Medina v. MGM Grand Hotel, Inc.*, 255 F.3d 1069 (9th Cir. 2001)

[32] *Rulon Miller v. IBM Corp.*, 162 Cal. App. 3d 241 (1984)

[33] Lab. Code secs. 1101, 1102

[34] Lab. Code sec. 1042

[35] Lab. Code sec. 1044

[36] Lab. Code sec. 1041(a)

[37] Lab. Code sec. 1043

[38] Lab. Code sec. 1041(b)

Keeping Fingerprints and Photographs Private

You can maintain photographs and fingerprints of employees and applicants, but only for your use. Generally, you cannot require applicants or employees to provide fingerprints or photographs as a condition of employment if they will be provided to a third party and used to the applicant's or employee's detriment.[39]

However, some employers, such as certain financial institutions and the child care industry, *must* obtain fingerprints before hiring. Consult legal counsel before fingerprinting any applicant or employee. Requiring candidates to submit photographs with employment applications may be deemed an inappropriate screening of applicants who belong to a protected class.

Keeping Electronic Information Private

As workplace technology use grows, so do your legitimate fears of unauthorized access to confidential information.

Your responsibility for keeping certain personnel information private is not excused because you keep the information electronically. You must closely guard access to computer files that contain sensitive information. You can be held liable for negligently failing to protect your system from unauthorized access. Consider hiring a security professional to examine your company's computer network to determine if your network is vulnerable to an outside attacker. In some situations, encryption technology may be necessary. Encryption scrambles data to make the information unreadable to anybody who does not have the key to decrypt the data. But encryption technology can also allow the message sender to disguise the message's origin. As a result, it can be impossible to discover which employee is, for example, sending sexually suggestive messages in violation of your company's anti-harassment policy. Similarly, encryption technology can prevent you from accessing and monitoring email messages between employees.

California passed a law affecting all companies and state agencies that own or license computerized data that includes personal information.[40] Personal information is defined as a person's first name or initial and last name combined with any of the following:

- Social Security number (SSN)
- Driver's license or California Identification Card number
- Account number or credit or debit card number combined with any required security code, access code or password
- Medical information
- Health insurance information[41]

Personal information also includes a user name or email address in combination with a password or security question and answer that would allow access to an online account.

If a security breach involves any of this unencrypted personal data, the company must notify all affected California residents of that breach. You must give notice by one of several approved methods and within specified time limits.

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[39] Lab. Code sec. 1051

[40] Civ. Code sec. 1798.82

[41] Civ. Code sec. 1798.80

For purposes of this section, "notice" can be provided by one of the following methods:

- Written notice
- Electronic notice, if the notice provided is consistent with the provisions about electronic records and signatures set forth in Section 7001 of Title 15 of the United States Code
- Substitute notice, if the agency demonstrates that the cost of providing notice would exceed $250,000, or that the affected class to be notified exceeds 500,000 individuals or the agency does not have sufficient contact information:
  - Email notice when the agency has an email address for the subject people
  - Conspicuous posting of the notice on the agency's website, if the agency maintains one
  - Notification to major statewide media

An agency that maintains its own notification procedures as part of an information security policy relating to personal information is in compliance with the law's notification requirements if the agency notifies affected people pursuant to its policies when a security breach occurs. The notification must be consistent with the state law's time limits.

The law also requires any person or business that becomes aware of a security breach to notify the data's owner or licensee immediately. Allowances are made for delay in giving notice at the direction of a law enforcement agency.[42]

Payment Card Industry Security Standards

Merchants and service providers who accept payment by credit card are subject to security standards set by the credit card companies. Though all merchants should already comply with the standards, there are different levels of compliance requirements.

If your company accepts payment by credit card and you have not yet met the compliance requirements, you can access information at www.pcisecuritystandards.org/security_standards/pci_dss.shtml.

Keeping Social Security Numbers Private

California law on the use and publication of SSNs prohibits:[43]

- Posting or publicly displaying an individual's SSN in any manner. "Publicly posting" or "publicly displaying" means to intentionally communicate or otherwise make available to the general public
- Printing an individual's SSN on any card required for the individual to access products or services. This can include your employee identification cards and badges
- Requiring an individual to transmit his/her SSN over the Internet, unless the connection is secure or the SSN is encrypted
- Requiring an individual to use his/her SSN to access a website, unless a password or unique PIN or other authentication device is also required to access the website. This restriction may require a change in systems used to access or transmit personnel, business, human resources or payroll information over the Internet or intranet

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[42] Civ. Code secs. 1798.29, 1798.82

[43] Civ. Code sec. 1798.85

- Printing an individual's SSN on any materials mailed to the individual, unless state or federal law requires the SSN to be on the document. Applications and forms sent by mail can include SSNs
- Printing a SSN on a postcard or other mailer not requiring an envelope or visible on the envelope or without the envelope being opened if the SSN can be mailed in an otherwise permissible manner
- Encoding or embedding an SSN in or on a card or document, including, but not limited to, using a bar code, chip, magnetic strip or other technology, in place of removing the SSN, as required by law

All employers must print no more than the last four digits of an employee's SSN on check stubs or similar documents or substitute some other identifying number.

If you have used an individual's SSN in any of these ways prior to July 1, 2002, you can continue using that individual's SSN in that manner, if you meet the following conditions:

- You use the SSN continuously. If you stop using the SSN for any reason, you cannot resume its use
- You provide the individual with an annual disclosure, beginning immediately, that he/she has the right to make a written request to stop the use of his/her SSN in a prohibited manner. You must perform all of the following actions:
  - Implement the request within 30 days of receipt
  - Do not charge a fee for implementing the request
  - Do not deny services to an individual because the individual makes a request

The law does not prevent the collection, use or release of an SSN as required by state or federal law or the use of an SSN for internal verification or administrative purposes.

If you maintain computer personnel files or customer files that include names and SSNs, driver's license numbers or account numbers and security codes that permit access to financial information, you must maintain the security of those data files. If a breach of security results in unauthorized acquisition of unencrypted data, you must give timely notification of the breach to any affected California resident.[44]

You must give this notice as quickly as possible, delayed only by the reasonable time necessary to discover the scope of the breach and to allow steps to restore the integrity of the data, consistent with the needs of law enforcement to investigate the breach.

You must give notice in written form or by electronic means that complies with the law. In cases requiring notice to more than 50,000 people or where the expense of actual notice exceeds $250,000, you can use other authorized means of giving notice, including the use of email, website postings and statewide media. You can maintain your own notification procedures as part of an overall information security policy, if it meets the timeliness requirements of the law. You must comply with your policies.

To ensure a uniform, statewide approach to this issue, this state law supersedes all local laws, rules and regulations.

California law also prohibits employers from taking adverse action against an employee because he/she updates his/her Social Security number.[45] See "Verifying Social Security Numbers" in Chapter 3, page 44.

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[44] Civ. Code sec. 1798.82

[45] Lab. Code sec. 1024.6

Keeping Driver's Licenses Private

Any driver's license information obtained by an employer shall be treated as private and confidential. Driver's license information cannot be disclosed to any unauthorized person or used for any purpose other than to establish identity and authorization to drive.[46]

It can be a violation of the Fair Employment and Housing Act for an employer to require a person to present a driver's license unless possessing a driver's license is:

- Required by law
- Required by the employer and the employer's requirement is otherwise permitted by law

In addition, employers cannot discriminate against immigrants who hold one of the unique drivers' licenses issued under the Vehicle Code. For more information, see "Immigrant Workers and Discrimination/Retaliation Protections" in Chapter 26, page 744.

Allowing Access to Employee Information

Employees and some government agencies have the right to access certain records in certain circumstances.

Access to Personnel Files

Employees and former employees have the right to access their personnel files. It is important that you store and maintain personnel records in a manner that is required by law.[47]

Both current and former employees have the right to inspect and copy the contents of personnel files.[48] The law allows current and former employees, or their representatives, to have a copy of the contents of the file if they pay the actual costs of copying.

Under prior law, it was unclear what the rights of former employees were and there were conflicting decisions about former employees' rights to access.

The law also specifically details where and how the records must be made available, including copies, what information can be excluded or redacted from the file, and penalties for failure to comply. The law lists employee rights and employer obligations.

Personnel File Checklist

Employer's Obligation to Retain Records

An employer is required to maintain a copy of each employee's personnel records for a period of not less than three years after termination of employment.[49] This brings the law regarding personnel records in line with the law regarding copies of payroll records.[50]

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[46] Vehicle Code sec. 12801.9

[47] Lab. Code sec. 1198.5

[48] AB 2674

[49] Lab. Code sec. 1198.5(c)(1)

[50] Lab. Code sec. 226

Employee's Right to Inspect and Copy

Every current and former employee has the right to inspect the personnel records that the employer maintains relating to the employee's performance or to any grievance concerning the employee.[51]

Current and former employees have the right to not only inspect the file but also to receive a copy of the contents. If a copy is requested, the employee or former employee can be charged the actual cost of copying.[52]

Employees have the right to designate a representative to conduct the inspection of the file or receive a copy of the file. The representative must be authorized in writing by the employee to inspect or receive a copy of the current or former employee's personnel file.[53]

Employers may take reasonable steps to verify the identity of a current or former employee or his or her authorized representative.[54] For example, the employer may request a driver's license or valid photo ID.

Manner of Requesting Inspection or Copy

The employer may designate a representative to handle requests for access to personnel records.[55]

Any request to inspect or copy personnel records must be made in writing by the current or former employee, or his or her representative.[56]

Employers must develop and provide a written form that employees can use to request access to, and a copy of, records in the personnel file.

The written form must be made available to the employee (or representative) upon verbal request from the employee to either the employee's supervisor or an individual that the employer has designated to receive a verbal request for the form.[57]

Personnel Records Request

Timing of Inspection or Copying

While the law states that the employer should make records available at reasonable intervals and at reasonable times, the law also now sets specific deadlines for allowing inspection or producing copies:

- The employer must make the contents available for inspection or produce a copy not later than 30 calendar days after the employer receives the written request.[58]
- If the employer and the current/former employee or representative agree in writing to a date beyond 30 calendar days, additional time will be allowed — as long as the agreed upon date does not exceed 35 calendar days from the employer's receipt of the written request.

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[51] Lab. Code sec. 1198.5(a)

[52] Lab. Code sec. 1198.5(a)(b)

[53] Lab. Code sec. 1198.5(e)

[54] Lab. Code sec. 1198.5(g)

[55] Lab. Code sec. 1198.5(f)

[56] Lab. Code sec. 1198.5(b)(2)

[57] Lab. Code sec. 1198.5(b)(2)(A)(ii)(B)

[58] Lab. Code sec. 1198.5(b)

Location of Inspection

For current employees, the employer must make the records available for inspection, and, if requested, provide a copy, at either:[59]

- The place where the employee reports to work, or,
- Another location agreeable to the employer and the requester.

If the employee is required to inspect or receive a copy at a location other than the place where he or she reports to work, the employee cannot lose compensation for the time away from work.

For former employees, the employer must make the records available for inspection, and, if requested, a copy, at:[60]

- The location where the employer stores the records, unless the parties mutually agree in writing to a different location.
- A copy may be received by mail if the former employee reimburses the employer for actual expenses.

If a former employee was terminated for a violation of law, or employment-related policy, involving harassment or workplace violence an employer may comply with a personnel records request by either:[61]

- Making the personnel records available to the former employee at a location other than the workplace that is a reasonable driving distance of the former employee's residence.
- Providing a copy of the personnel records by mail.

Limits to Requests

An employer is not required to comply with more than 50 requests under this statute to inspect and receive a copy of personnel records filed by a representative(s) of employees in one calendar month.[62]

An employer is not required to comply with more than one request per year by a former employee to inspect or receive a copy of his or her personnel records.[63]

If an employee or former employee files a lawsuit that relates to a personnel matter against the employer or former employer, the right to inspect or copy personnel records ceases while the lawsuit is pending.[64]

What is Included in a Personnel File

The question often arises as to what should be kept in an employee's personnel file. Some information should be kept separate from the personnel file. California law mandates that employers establish appropriate procedures to ensure all employee medical records and information will remain confidential and will be protected from unauthorized use and disclosure.

One appropriate procedure for ensuring confidentiality is to establish a second file for each employee for information protected by privacy laws. This confidential file may contain medical records and any other sensitive information, such as private financial records. For more information, see "Keeping Employee Information Private" on page 132.

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[59] Lab. Code sec. 1198.5(c)2)

[60] Lab. Code sec. 1198.5(c)(3)(A):

[61] Lab. Code sec. 1198.5(c)(3)(B)

[62] Lab. Code sec. 1198.5(p

[63] Lab. Code sec. 1198.5(d)

[64] Lab. Code sec. 1198.5(n)

But aside from these type of privacy limitations, the decision regarding what information to place in an employee's personnel file depends on your company's practices and should take into consideration who has access to the file. The following types of information may be included in personnel files:

- Employment application and/or resume
- Payroll authorization forms
- Records reflecting a change in payroll rate, date of seniority and other changes such as name change, date of birth and correction of Social Security number
- Notices of commendation, warning, discipline or termination
- Notices of layoff, leave of absence and similar matter
- Notices of union requirements and membership dues check-off
- Education and training notices and records
- Test results (tests associated with the job, such as typing)
- Performance appraisal or interview evaluation ratings
- Attendance and absence records
- Promotion recommendations
- Production, quality and other individual records
- Records of grievances

Again, what you decide to include in the file may depend on who has access, and you may even decide to have more than one type of files — one for direct supervisors that includes information such as performance evaluations and absence records (excluding medical information) and another for your human resources manager that includes payroll information and more sensitive information, such as wage garnishments or investigative files. If, for example, your company only allows your human resources department to access the entire file, your company may feel comfortable including a wide variety of information in the personnel file.

Exceptions to an Employee's Right to Access Personnel Files

While the statute does not define a personnel file or indicate what specifically should be included in it, employers have the right to redact the name of any nonsupervisory employee from the records being copied or produced.[65]

An employee's right to view his/her personnel file does not apply to:[66]

- Records relating to the investigation of a possible criminal offense
- Letters of reference
- Ratings, reports or records:
  - Obtained prior to the employee's employment
  - Prepared by identifiable examination committee members

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[65] Lab. Code sec. 1198.5(g)

[66] Lab. Code sec. 1198.5(h)

  - Obtained in connection with a promotional examination
- Employees covered by the Public Safety Officers Procedural Bill of Rights
- Employees of agencies covered by the Information Practices Act of 1977
- Employees covered by valid collective bargaining agreements if the agreement expressly provides for all of the following:
  - Wages, hours of work, and working conditions of employees
  - A procedure for inspection and copying of personnel records
  - Premium wage rates for all overtime hours worked
  - A regular rate of pay of not less than 30 percent more than the state minimum wage

Penalties

Prior law made failure to comply with the statute a misdemeanor punishable by fine or imprisonment. The new law provides that violation is an infraction (a lesser criminal offense).[67]

The law also permits a current or former employee or the Labor Commissioner to recover a penalty of $750 from the employer if the employer fails to permit inspection or copying within the times discussed in the law. The current or former employee may also bring an action for an injunction to force compliance and may recover costs and attorneys fees.[68]

Access to Payroll Files

You must maintain comprehensive payroll records.[69]

Either semimonthly or at time of payment, you must give each employee a statement of deductions and the inclusive dates for which he/she is paid. The statement shall be in English and in indelible ink or an equivalent form, properly dated.[70] For more information, see “Itemized Wage Statement” in Chapter 11, page 285 and “Timekeeping and Recording Guidelines” in Chapter 12, page 329.

Employers must maintain a copy of the statement and a record of the deductions on file for at least three years at the place of employment or at a central location within California.[71]

A “copy” can be a duplicate of the itemized statement provided to an employee or a computer-generated record that accurately shows all of the information required by law to be included in the itemized statement.[72]

California law requires you to comply with a written or oral request from a current or former employee to inspect or copy payroll records within 21 calendar days. You can designate the person to whom the request for payroll records must be addressed.[73] For information on penalties for failure to comply with these laws, see “Itemized Wage Statement” in Chapter 11, page 285.

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[67] Lab. Code sec. 1198.5(m)

[68] Lab. Code sec. 1198.5(k)(l)

[69] Lab. Code sec. 1174

[70] Lab. Code sec. 226

[71] Lab. Code sec. 226(a)

[72] Lab. Code sec. 226(a)

[73] Lab. Code sec. 226(c)

Government Agencies and Access to Records

You must give the Industrial Welfare Commission (IWC) and duly authorized representatives of the Division of Labor Standards Enforcement (DLSE) access to records and workplaces to enforce provisions of IWC orders. The DLSE's agents must conduct any inspections or investigations in a reasonable manner. DLSE agents must comply with the same rules as others concerning what the law permits you to reveal from an employee's personnel file.

Civil Action Subpoena of Records

There may be situations where employment records or other corporate records are being subpoenaed from your organization.

In most civil actions, a subpoena for employment records must contain an affidavit stating that the employee received notice of the subpoena.[74] Anyone who subpoenas employment records must comply with these rules:

- If the subpoena notice is issued by mail to the custodian of records (the employer), the date the subpoena specifies for producing the employment records cannot be fewer than 10 days from the date the subpoena is issued. If the subpoena is served on the custodian of records (the employer) in person, the subpoena must be served five days prior to the date stated for the production of the records.[75]
- The party issuing the subpoena must provide notice of the subpoena to the employee whose records are being subpoenaed. The employee must receive a copy of the subpoena and a copy of the affidavit that supports the issuance of the subpoena.
- The subpoena can be served by mail to the employee's last known address or to the employee's attorney of record.
- The employer (custodian of records) must receive the subpoena and a copy of the affidavit that supports the subpoena's issuance. Alternatively, the employer can accept a release for the records, signed by the employee.
- Every copy of the subpoena and affidavit served on the employee or his/her attorney must be accompanied by a notice, in a typeface that calls attention to the notice, indicating that:
  - Employment records about the employee are being sought from the witness (employer) named on the subpoena
  - The employment records can be protected by a right of privacy
  - If the employee objects to the witness furnishing the records to the party seeking the records, the employee must file papers with the court before the date specified on the subpoena for producing the records
  - If the subpoenaing party does not agree in writing to cancel or limit the subpoena, the employer should consult an attorney about the employee's interest in protecting his/her rights of privacy

If you receive subpoenas for employment records that do not comply with the rules stated above, you should not respond to the subpoena until you have obtained advice from legal counsel as to the validity of the subpoena.

This law does not apply to certain state and local agencies, nor to certain Department of Industrial Relations (DIR) and workers' compensation proceedings.

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[74] Civ. Code sec. 1985.6

[75] Civ. Code secs. 1985.6, 1013

Child Support Laws and Employee Records

The California Department of Child Support Services and your local child support agency are responsible for collecting child support payments. You must comply with valid child and/or spousal support orders. If you need assistance complying with a child or spousal support order, or for additional information on compliance and your responsibility and liability, download the "California Child Support: A Guide for Business" from the Department of Child Support Services at www.childsup.ca.gov/Portals/0/employer/docs/EmployerHndbk.pdf.

Testing Applicants and Employees

As with other employee records, the results of the tests you administer to applicants and employees should remain confidential and available only to those authorized to know the results.

Physical Examinations

Employers may not conduct physical examinations prior to making an offer of employment.

After a job offer has been made, you can require the worker to undergo a physical examination at your expense before beginning employment. To be lawful, the employer and employee must complete all non-medical aspects of the application process prior to conducting the examination. An employer may withdraw an offer of employment based on the results of an examination only if the applicant is unable to perform the essential duties of the job with or without reasonable accommodation.

After an employee begins employment, California law requires the examination to be job-related and consistent with business necessity. All entering employees in the same job classification must be subject to the same examination.[76]

You cannot require an employee or applicant to pay for any physical examination required as a condition of employment or required by any federal, state or local government law or regulation. You cannot make deductions from an employee's compensation to pay for these exams.[77] If you require an employee to have a driver's license as a condition of employment, you must pay for any physical exam that may be required to issue the driver's license unless the physical exam occurred prior to the time the employee applied for the job.[78]

The ADA and FEHA address several issues surrounding the right to require physical examinations. They impose strict limitations on the use of information obtained from examinations and inquiries. For more information, see "When Medical Exams and Inquiries are Permitted" in Chapter 28, page 861.

Drug and Alcohol Tests

California courts have drawn a distinction between the rights of job applicants and the rights of employees in the area of drug testing. Various laws, including the constitutional right to privacy, impact drug testing. See Chapter 9, "Drugs, Alcohol and Smoking in the Workplace" for a detailed discussion.

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[76] Govt. Code sec. 12940(e)

[77] Lab. Code sec. 222.5

[78] Lab. Code sec. 231

Polygraphs and Lie Detector Tests

The Employee Polygraph Protection Act of 1988 places stringent regulations on employers' use of polygraphs, extremely limiting their usefulness. Federal law greatly restricts the use of lie detector tests as employment screening devices and prohibits the majority of employers from requiring or suggesting that applicants undergo tests or from using test results. Federal law also prohibits:

- Requiring, requesting, suggesting or causing, directly or indirectly, any employee or prospective employee to take or submit to a lie detector test
- Basing employment decisions solely on the test results
- Disciplining, discharging or discriminating against any employee or applicant for refusing to take a lie detector test[79]

In addition to these protections under federal law, state law similarly prohibits retaliating against or discharging an employee for refusing to submit to a polygraph, lie detector or similar test.[80]

The federal act contains severely limited exceptions to the general ban on polygraph testing. Under extremely limited circumstances, you can perform polygraph tests on:

- Prospective employees of security guard firms
- Employees involved in the manufacture, distribution or dispensation of controlled substances
- Current employees who are reasonably suspected of being involved in a workplace incident that resulted in an economic loss or injury to your business[81]

Written Honesty Tests

Honesty tests can be viable alternatives to lie detector tests, but you must administer them carefully due to current uncertainty as to how legislatures and courts will treat them. Written honesty examinations are intended to accurately assess an applicant's honesty by quantifying the applicant's self-perceptions of honesty through a series of questions directed at attitudes toward theft and personal experience with dishonesty. The purpose of most of the questions is to isolate dishonest behavioral tendencies and attitudes of the test taker about dishonesty.

A test taker's profile is compiled from his/her answers, generally in multiple choice, true or false, or yes or no format. The individual's profile is then obtained by comparing his/her answers to the profiles of people who have been independently judged as honest and dishonest. The results are used as a predictor of the applicant's on-the-job integrity.

It is unclear if honesty examinations violate the Labor Code section 432.2 ban on polygraph "or similar" tests as a condition of employment. Consult legal counsel if you wish to use honesty tests.

Psychological Tests

Psychological testing is rarely allowed. You must justify psychological testing by a compelling interest. California courts have addressed the issue of psychological testing of job applicants in the context of the state's constitutional right to privacy. In contrast to the employee versus applicant distinction relied upon in drug testing cases, a California Court of Appeal ruled that in psychological testing, no distinction should be made between the privacy rights of job applicants and employees. Accordingly, it held that any violation of an applicant's right to privacy must be justified by a compelling interest. In *Soroka v. Dayton Hudson Corp.*, the court found that an employer could not justify a compelling interest when including questions about religious beliefs and sexual orientation in the psychological test, because no relation exists between these questions and job performance.[82]

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[79] 29 U.S.C. 2001-2009

[80] Lab. Code sec. 432.2

[81] 29 U.S.C. 2006

Psychological testing may, in certain circumstances, also violate the ADA. Before conducting psychological testing, consult legal counsel.

Investigating Applicants

Collection, dissemination and use of personal and credit information gathered by consumer credit reporting agencies are covered by both federal and state law. California prohibits the use of credit reports for employment purposes, except in limited circumstances. Most of these laws are intended to ensure that the applicant or employee is aware that this information is being sought and provides the employee the opportunity to question and ensure the information's accuracy.

Obtaining Applicant and Employee Credit Reports

Both federal and state laws restrict the use of credit information in the hiring process.[83] In the employment context, a consumer credit report is any written, oral or other communication of any information by a consumer credit reporting agency (CRA) bearing on an individual's credit worthiness, credit standing or credit capacity, which is used as a factor in evaluating an applicant for employment, promotion, reassignment or retention.[84]

Under California law, employers and prospective employers (not including certain financial institutions) are generally prohibited from using a consumer credit report for employment purposes.[85]

The prohibition applies to all consumer credit reports as defined above, but does not apply to reports that both:

- Verify income or employment; and
- Do not include credit-related information in that verification report, such as credit history, credit score, or credit record.

In other words, if an employer runs a report that just includes the applicant's employment history and no additional credit information that report would not be prohibited.

The prohibition against the use of credit reports for employment purposes does not apply to the following positions:

- A managerial position (as defined in the executive exemption of Wage Order 4 of the IWC)
- A position in the state Department of Justice
- A sworn peace officer or other law enforcement position
- A position for which the information in the report is required by law to be disclosed or obtained

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[82] *Soroka v. Dayton Hudson Corp.*, 18 Cal. App. 4th 1200 (1991)

[83] Civ. Code secs. 1785.1, et seq.; 15 U.S.C. 1681-1681(u)

[84] Civ. Code sec. 1785.3 (c)(f); 15 U.S.C. 1681a (d) and (h)

[85] Govt. Code sec. 1024.5

- A position that involves regular access (for any purpose other than routine solicitation and processing of credit card applications in a retail establishment) to all of the following types of information of any one person:
  - Bank or credit card account information
  - Social Security number
  - Date of birth
- A position in which the person is, or would be, any of the following:
  - A named signatory on the bank or credit card account of the employer
  - Authorized to transfer money on behalf of the employer
  - Authorized to enter into financial contracts on behalf of the employer

  Note: A "named signatory" on an employer's bank or credit card account is more than just a person who is authorized to use a company credit card. Instead, it appears the intent of this law is to cover positions where an individual is the one signing the credit card agreement on behalf of the company. No specific definition has been provided by regulation or case law.
- A position that involves access to confidential or proprietary information (including trade secrets), defined as information that both:
  - Derives independent economic value, actual or potential, from not being known to, and not being readily ascertainable by proper means by, other persons who may obtain economic value from the disclosure or use of the information; and
  - Is the subject of an effort that is reasonable under the circumstances to maintain the secrecy of the information.
- A position that involves regular access to cash totaling $10,000 or more of the employer, a customer or client, during the workday

! Under the exception for managerial positions, if you want to obtain and use a credit report, you must make sure that the position properly meets the test for the executive exemption under Wage Order 4 (see "Executive Exemption" in Chapter 4, page 53). If you misclassify the employee as exempt at the time of recruitment and run a credit check based on the misclassification, you could be liable.

Procedure if Report Allowed

If one of the exceptions applies and you are able to obtain and use the report, there are still restrictions on how you go about obtaining the report. The Fair Credit Reporting Act (FCRA) places additional restrictions on your ability to use credit reports for employment purposes.[86] If information from a credit report is used for employment purposes, you must complete the following actions:

- Make a clear and conspicuous written disclosure to the applicant before the report is obtained, in a document consisting solely of the disclosure, that a consumer report can be obtained. The notice must:
  - Inform the person that a report will be used
  - Identify the specific basis allowing use of the report (which exception applies)
  - Inform the person of the source of the report
  - Contain a box that the person can check off if he/she wishes to receive a copy of the report

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[86] U.S.C. 1681-1681u

  - Obtain prior written authorization from the applicant. See *Notice and Authorization to Obtain Consumer Credit Report*.
- As a best practice, you should provide the *FCRA - Summary of Your Rights* at the same time you make the disclosure of your intent to obtain a report.
- Certify to the CRA that you made the disclosure and obtained authorization, and that you will not use the information in violation of any federal or state equal opportunity law or regulation. You must also certify that if you take any adverse action based on the credit report, you will provide a copy of the report and a summary of the FCRA rights to the person. See *Certification to Consumer Credit Reporting Agency*.
- If a report is requested by the employee or applicant, the employer must request that a copy be provided to the employee at the time the employer requests the report from the CRA. The report must be at no charge to the employee, and must be given at the same time as the employer's report.
- Before taking adverse action based on the credit report, provide the person with a copy of the *Pre-Adverse Action Disclosure*, a copy of the credit report and a summary of FCRA rights. Obtain this summary from the CRA.

Notice and Authorization to Obtain Consumer Credit Report

Certification to Consumer Credit Reporting Agency

Pre-Adverse Action Disclosure

Fair Credit Reporting Act - Summary of Your Rights

You must also notify the individual after you take any adverse action based at least in part on information contained in a credit report.[87] See the *Adverse Action Notice*. The notification must be in writing and must include all of the following information:

- Name, address and telephone number of the consumer reporting agency that provided the report, including a toll-free telephone number if it is a nationwide consumer reporting agency
- A statement that the consumer reporting agency did not make the adverse decision and is not able to explain why the decision was made
- A statement setting forth the person's right to obtain a free disclosure of his/her file from the consumer reporting agency if requested within 60 days
- A statement setting forth the person's right to dispute the accuracy or completeness of any information provided by the consumer reporting agency directly with that agency

If you take an adverse action based on the type of information covered by the FCRA and you obtained this information from an entity affiliated with you by common ownership or control,[88] you must notify the person of the adverse action. You must inform the person that he/she can obtain a disclosure of the nature of the information you relied upon by writing a request within 60 days of receiving the *Adverse Action Notice*. If the person makes a request, you must disclose the nature of the information no later than 30 days after receiving the request.

If you take adverse action based on the report and the person requests a copy of the report from you, you must furnish the person with that report and the summary of FCRA rights within three business days from receipt of the request.

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[87] FCRA sec. 615(a)

[88] FCRA sec. 615(b)(2)

Adverse Action Notice

Obtaining Investigative Consumer Reports

Investigative consumer reports go further than credit reports by supplying information about the character, general reputation, personal characteristics and mode of living of the subject of the report. This information is obtained through a more intensive investigation, which can include personal interviews with neighbors, friends, business associates, etc. The FCRA provides special rights regarding these reports, as does California law. This ***Digest*** provides the rules and forms that satisfy the requirements of both federal and state law. Failure to comply with these rules can result in significant penalties and costs.[89]

Effective January 1, 2012, the investigative report must include the investigative consumer reporting agency's Internet address. If the agency does not have an Internet address, the report must include the agency's telephone number. These requirements allow the person to find information on the investigative reporting agency's privacy practice, including if the person's personal information will be sent outside the United States or its territories.[90]

If you intend to obtain an investigative consumer report, you must disclose this intention to the person being investigated and state the report's purpose. You should also provide a "Summary of Rights" under the FCRA. Make your disclosure of intent, in a separate stand-alone document that consists solely of the disclosure, any time before the report is requested or caused to be made. Get authorization to obtain the investigative consumer report.

Disclosure and Authorization to Obtain Investigative Consumer Report

The disclosure must inform the person:

- That an investigative consumer report will be made about his/her character, general reputation, personal characteristics and mode of living;
- The report's permissible purpose;
- The investigative consumer reporting agency's name, address and telephone number; and
- The requested investigation's nature and scope [91]

The disclosure must also state that, under section 1786.22 of the California Civil Code, the person can view, during normal business hours, the file maintained by the consumer reporting agency. He/she can also obtain a copy of this file upon submitting proper identification and paying the costs of duplication services, by mail or by appearing at the consumer reporting agency in person. He/she can also receive a summary of the file by telephone. The agency must have personnel available to explain the file. The agency must explain any coded information appearing in the file. If the individual appears in person, another person of his/her choice can come along, if this person furnishes proper identification.

You must obtain the person's written authorization to obtain the report.[92] The authorization must provide, by means of a check box, a way for the person to request a copy of any report that is prepared. If the person wants to receive a copy of the report, you must send the copy within three business days of receipt. To send a copy to the person, you can contract with any other entity, such as the consumer

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89. Civ. Code sec. 1786.50
90. Civ. Code sec. 1786.16(2)(B)(vi)
91. Civ. Code sec. 1786.16 (a)(2)(B)
92. Civ. Code sec. 1786.16 (a)(2)(C)

reporting agency. The notice to request the report can be contained on either the disclosure form or a separate consent form. The copy of the report furnished to the person must contain the name, address and telephone number of the party that issued the report, and how to contact that party.[93]

You are required to certify to the consumer reporting agency that you have made the applicable disclosures to the subject of the report. These disclosures include accepting the obligation to provide the person with a copy of the report in a timely manner if requested. You must also provide the person with the consumer reporting agency's name and address, if adverse action is taken.[94]

Certification to Consumer Credit Reporting Agency

Before taking adverse action based on an investigative consumer report, provide the person with a copy of the *Pre-Adverse Action Disclosure*, and include a copy of the consumer report that you relied on. This gives the person an opportunity to explain any negative information. Also provide a copy of the FCRA notice, a *Summary of Your Rights Under the Fair Credit Reporting Act.*

Pre-Adverse Action Disclosure

Fair Credit Reporting Act -Summary of Your Rights

A common question is how long should an employer wait to allow the person to explain any negative information before making a final decision. The FCRA does not specifically address the length of time, but a reasonable amount of time should be allowed. In one Congressional analysis, a five business day period was recommended and that is a standard which is often used by employers.[95]

If you deny employment after obtaining an investigative consumer report, before taking the action, advise the person facing the adverse action. Use the *Adverse Action Notice*. Inform the applicant/employee:

- That the adverse action was because of information in the report;
- Of the name and address of the investigative consumer reporting agency making the report;
- That the company selling the report did not make the decision and cannot give specific reasons for it; and
- That he/she has a right to dispute the report and may obtain an additional free report within 60 days.[96]

Adverse Action Notice

You can procure or order an investigative consumer report for the purposes of employment if you suspect wrongdoing or misconduct by the subject of the report. In this case, these rules do not apply.[97]

The FCRA prohibits consumer reporting agencies from providing consumer reports that contain medical information for employment purposes or in conjunction with credit or insurance transactions, without the specific prior consent of the subject of the report. In the case of medical information being sought for employment purposes, the individual must explicitly consent to the release of the information in addition to generally authorizing a consumer report.

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[93] Civ. Code sec. 1786.16(b)

[94] Civ. Code sec. 1786.16(a)(4)

[95] H.R. Representatives No. 103-486, 1994

[96] Civ. Code sec. 1786.40

[97] Civ. Code sec. 1786.16(c)

Comply with all legal recordkeeping guidelines regarding retention of any background report information. When you dispose of background reports (and information gathered from them), the FCRA requires that you do so "securely," which can include burning, pulverizing or shredding paper documents and permanently removing electronic information form your computer systems so that the information can't be read or reconstructed.

Limit the scope of consumer investigations to job-related information. Investigative reports that are not job-related may violate federal and state civil rights laws if they have a disparate impact on minority job applicants. Treat all job applicants and employees equally without regard to race, national origin, sex, religion, age or any other protected characteristic.

Obtaining Background Checks and Investigations by Employers

You can obtain public information for employment purposes without using the services of an investigative consumer reporting agency in limited circumstances.

Special rules apply to anyone who collects, assembles, evaluates, compiles, reports, transmits, transfers, communicates or receives public records relating to a consumers character, general reputation, personal characteristics or mode of living.[98] Public records include records documenting an arrest, indictment, conviction, civil judicial action, tax lien or outstanding judgment.

You must provide the investigated individual with a copy of the public record within seven days of receiving the information, regardless of whether the information is received in written or oral form, unless the person waives the right to receive that information in writing. On an employment application or any form, you can include a check box stating that the applicant waives the right to receive a copy of the public record. If you take any adverse action as a result of receiving information contained in those public records, you must provide a copy of the public record to the person, even if he/she waived his/her rights to receive a copy. Adverse action includes denial of employment or any other action that adversely affects any current or prospective employee.

If you gather the information in connection with an investigation for suspicion of wrongdoing or misconduct by the subject, you can withhold the public records until the investigation is completed. If information is gathered on employees who are not the subject of the investigation, you must provide the public records obtained on those people unless you have secured waivers or adverse action is ultimately taken against those additional people.

Obtaining Criminal History

Employers should avoid a rule that automatically bars employment to any applicant with a record of criminal conviction. This type of policy may violate local, state and federal law if the conviction is not job-related and the policy has a disparate impact upon a protected class.

San Francisco enacted strict prohibitions on the use of criminal history information during the application process. San Francisco employers should review the information about San Francisco's Fair Chance Ordinance.

General Rules

The following general rules relating to the use of criminal history information apply to California employers.

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[98] Civ. Code sec. 1786.53

This area of the law is in flux. Employers who must conduct criminal background checks to comply with various state laws should consult with legal counsel.

You cannot ask job applicants to disclose information about:[99]

- Arrests or detentions not resulting in conviction
- Information concerning a referral to or participation in a criminal diversion program (a criminal diversion program is a work or education program as part of probation)
- Convictions for most marijuana possession offenses more than two years old
- Convictions that have been judicially dismissed or ordered sealed pursuant to law

You cannot seek the prohibited criminal history information from any other source, nor use it as a factor in determining any condition of employment, including decisions related to hiring, promoting, training or termination.[100]

A “conviction,” as defined in the California Labor Code, includes a plea, verdict or finding of guilt, regardless of whether a sentence was imposed by the court.[101]

Certain exceptions to the prohibition apply. Under state law, you can ask employees and applicants about any arrest for which the employee or applicant is out on bail or out on his/her own recognizance pending trial.[102] The law also does not prohibit an employer from asking about or using information about criminal convictions or criminal diversion programs when:[103]

- The employer is required by law to obtain that information
- The position would require the applicant to possess or use a firearm in the course of his/ her employment
- Individuals convicted of a crime are prohibited by law from holding the particular position the applicant is seeking, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation
- The employer is prohibited by law from hiring an applicant who has been convicted of a crime

Certain exceptions to the prohibition also exist for peace officers, health care employees and people with access to drugs and medication.[104]

Public Agencies and State Contracts

There are also limitations on when state and local agencies can request criminal history information.

The law prohibits a state or local agency from asking an applicant to disclose information regarding a criminal conviction until after the agency determines the applicant meets minimum employment qualifications as stated in any notice issued for the position.

The prohibition applies to requests to disclose information orally, such as in a phone screening or interview, or in writing and expressly prohibits any inquiry about conviction history on any employment application.[105] There are specified exceptions, such as where a criminal history background check is otherwise required by law for the position.[106]

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[99] Lab. Code 432.7, 432.8

[100] Lab. Code sec 432.7 (a)

[101] Lab. Code 432.7(a)

[102] Lab. Code sec. 432.7(a)

[103] Lab. Code sec. 432.7(m).

[104] Lab. Code sec. 432.7(b) et. seq

Contractors who bid on state contracts involving on-site construction-related services must certify that they will not ask individuals who are applying for on-site construction related jobs to disclose criminal history information at the time of the initial employment application. This law does not apply if the position requires a criminal background check under state or federal law. The law also excludes workers obtained through a union hiring hall pursuant to a collective bargaining agreement.[107]

EEOC Guidance on Criminal Background Checks

The Equal Employment Opportunity Commission issued "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions." The Guidance discusses how an employer's use of an individual's criminal history in making employment decisions could violate prohibitions against employment discrimination. The EEOC Guidance, issued in 2012, is not a federal law or regulation.

The Guidance demonstrates the EEOC's position on a particular issue and shows what the agency will be looking for when deciding to investigate an employment practice and whether to file charges. Since the 2012 Guidance was issued, the EEOC has filed lawsuits against several companies alleging that their background check practices discriminate against protected classes.

According to the EEOC Guidance, a policy or practice that excludes everyone with a criminal record from employment will not be job-related and consistent with business necessity.

Under the Guidance, an employer must demonstrate that any criminal history screening practice is both job-related and consistent with business necessity.

Employers commonly ask about criminal background on employment applications, using a box asking if the applicant has ever been convicted of a crime. The EEOC did not categorically ban the use of this box, but the Guidance recommends that "employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquires be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity."

The rationale for not asking on the initial application form is that the employer is more likely to objectively assess the relevance of the conviction if it becomes known once the employer has already learned of the applicant's qualifications and experience. San Francisco has, however, "banned the box." For more information, see "San Francisco's Fair Chance Ordinance" on page 158.

Under the EEOC Guidance, you can demonstrate that a criminal record exclusion policy meets the "job related and consistent with business necessity" standard by using a two-step approach consisting of a "targeted screen" of applicants plus an "individualized assessment."

A "targeted screen" of criminal records is used to identify applicants or employees who legitimately should be screened out due to criminal records. A targeted screen of criminal records considers at least:

- The nature and gravity of the crime
- The time elapsed since the offense
- The nature of the job

The EEOC recommends that employers next take the additional step and provide an opportunity for an "individualized assessment" for people excluded by the targeted screen.

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105. Lab. Code sec. 432.9(a)
106. Lab. Code 432.9(b)
107. Public Contract Code sec. 10186

An individualized assessment consists of:

- Notice to the individual that he/she has been screened out because of past criminal conduct
- An opportunity for the individual to demonstrate that he/she should not be excluded due to the particular circumstances
- Consideration by the employer as to whether the additional information provided by the individual warrants an exception to the exclusion and shows that the exclusion of this individual is not job related and consistent with business necessity

There has been backlash over the Guidance in federal courts and from various states challenging the presumptions made by the EEOC.[108] In addition, the Guidance does not address the potential liabilities employers may face if they hire an employee with a criminal record. On the other hand, the Guidance has not been directly revoked and its recommendations carry weight.

Given the current EEOC Guidance, as well as ongoing efforts to regulate this issue on federal, state and local levels, a standard job application form that results in automatic disqualification based on criminal history is not recommended. CalChamber's *Employment Application - Long Form* and *Employment Application - Short Form* include an optional request for criminal history information that can be used when circumstances warrant the request.

Employment Application - Long Form

Employment Application - Long Form - Spanish

Employment Application - Short Form

Employment Application - Short Form - Spanish

Ask about criminal history only when you can demonstrate that it is relevant to a specific job. Include the optional request for criminal history information only when consistent with business necessity and limit inquiries to those that are truly job-related. If you have employees in San Francisco, you must comply with the local Fair Chance Ordinance.

Meticulous recordkeeping — maintaining detailed reports on applicants, background check results and whether they were hired — can help you defend your criminal background check process.

Keep information about criminal records confidential. Periodically review any background check results to ensure that they are not having a discriminatory impact on any protected classes, and retain records demonstrating the fairness of all hiring practices.

San Francisco's Fair Chance Ordinance

San Francisco's Fair Chance Ordinance (FCO) "bans the box" and effectively eliminates the commonly used criminal history check box found on many employment applications, as well as imposing various other prohibitions and requirements related to obtaining and using criminal background information.

The FCO applies to not only regular employees, but also to part-time workers, contract workers, contingent workers and workers from a temp agency. The FCO, as explained below, prohibits any type of criminal history inquiry on a job application. Employers in San Francisco may want to use one of the following job applications:

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[108] *E.E.O.C. v. Freeman*, 288 F.R.D. 92 (D. Maryland 2012)

Employment Application for San Francisco Employers – Long Form
Employment Application for San Francisco Employers – Long Form - Spanish
Employment Application for San Francisco Employers – Short Form
Employment Application for San Francisco Employers – Short Form - Spanish

If you decide to run a background check at the permitted time, enclose the San Francisco FCO notice along with all other necessary disclosure and consent forms required by law.

San Francisco Fair Chance Ordinance - Notice to Job Applicants and Employees - English
San Francisco Fair Chance Ordinance - Notice to Job Applicants and Employees - Spanish
San Francisco Fair Chance Ordinance - Notice to Job Applicants and Employees - Chinese
San Francisco Fair Chance Ordinance - Notice to Job Applicants and Employees - Tagalog

The FCO does not limit an employer's ability to choose the most qualified and appropriate candidate among the applicants for a particular job. It does not require employers to hire or give preference to an unqualified individual with an arrest or conviction record.

The FCO is enforced by the San Francisco Office of Labor Standards Enforcement (OLSE). More information on the ordinance can be found by visiting the OLSE website at http://sfgsa.org/index.aspx?page=6615. A detailed FAQ is also available at http://sfgsa.org/modules/showdocument.aspx?documentid=12136.

The FCO applies to employers who:

- Are located or doing business in San Francisco
- Have 20 or more employees, whether or not those employees are all located in San Francisco

In other words, it does not matter if the employer is not based in San Francisco. The OLSE provides the following example:

> A company is based in Australia and employs 19 people in Australia and 1 person in San Francisco. Because the company employs 20 or more people total, and is doing business in San Francisco, the FCO applies to the one employee who is working in San Francisco.

The 20-person threshold includes owners, management and supervisorial employees. Job placement, referral agencies, and other employment agencies are also considered employers.

The ordinance's requirements and restrictions, however, apply only to employees and applicants whose duties, or prospective duties, are performed at a physical location in whole, or in substantial part, in San Francisco. The OLSE interprets "in substantial part" to mean an average of 8 hours of work performed per week in San Francisco.

For instance, according to the OLSE, if the employee who lives in San Francisco telecommutes from his/her home for a company located outside of San Francisco, that position is covered if the employee is working at least eight hours per week in San Francisco.

According to the OLSE, a company that uses a third party entity to run background checks on applicants must ensure that the third party complies with all of the FCO restrictions. Moreover, when an employer uses a temporary staffing agency or professional employer organization to employ people, both the employer and the staffing agency must comply with the FCO and both may be held responsible for noncompliance.

Off-Limit Inquiries

Under the FCO, you may *never* inquire about, require disclosure of or consider the following information:

- Arrests not leading to a conviction, except unresolved arrests still undergoing criminal investigation or trial
- Participation in or completion of a diversion or deferral of judgment program
- Convictions which have been judicially dismissed, expunged or made inoperative
- Convictions or determinations made in the juvenile justice system
- Convictions that are more than seven years old (the date of conviction being the date of sentencing). According to OLSE, if the date of sentencing was more than seven years ago, information about the conviction is off-limits, regardless of when the person finished serving the sentence.
- Information pertaining to any criminal offense other than a felony or misdemeanor, such as an infraction

These matters are considered "off-limits" and cannot be used for any reason at any stage of the hiring process.

What does "inquire" mean? Under the FCO, "inquire" means any direct or indirect employer conduct intended to gather information from or about an applicant, candidate, potential applicant or candidate, or employee, using any mode of communication. This includes, but is not limited to, application forms, background check reports and interviews.

An unresolved arrest is an arrest that is undergoing an active pending investigation or trial and has not yet been resolved.

Employers must still follow state and federal law regarding criminal background checks. If there is a conflict, state and federal requirements supersede the FCO's requirements. State and federal law mandate criminal background checks in certain industries. If you have questions about the applicability of federal or state law, please consult with legal counsel.

Timing of Non-Prohibited Inquiries

Even when you can inquire about an employee's criminal history (non-prohibited inquiries), the FCO regulates the timing of the inquiry and the required process:

- You cannot ask about criminal history on a job application or require job applicants to disclose criminal history information on the job application.
- You cannot inquire about criminal history until after the applicant or employee has had the first "live" interview, or after you have extended a conditional offer of employment. Even then, you cannot inquire about criminal history information that is "off-limits." A "live" interview includes an in-person interview and any interview using the telephone, videoconferencing or other technology.
- Before making any permissible criminal history inquiry under the FCO, you must provide the applicant/employee a written notice of rights. Use the *San Francisco Fair Chance Ordinance - Notice to Job Applicants and Employees*. There is also a posting requirement regarding this notice. For more information, see "Posting, Notice and Recordkeeping Requirements" on page 162Posting, Notice and Recordkeeping Requirements below.

- Before obtaining a copy of any background check report, you must also comply with all federal and state notice requirements — such as those under the federal Fair Credit Reporting Act (FCRA) and the California Investigative Consumer Reporting Agencies Act (ICRAA). For more information, see "Obtaining Investigative Consumer Reports" on page 153Obtaining Investigative Consumer Reports.

Limits on Use of Properly Obtained Criminal History Information

Assuming all of the steps for obtaining permissible criminal history information have been followed, the FCO still places restrictions on when you can make an employment decision based on an applicant/employee's conviction history.

If an applicant discloses criminal history, you are restricted under the FCO on how you can consider the information. The FCO requires employers to conduct an individualized assessment of the information and consider:

- Only "directly related" convictions
- The time that has elapsed since the conviction or unresolved arrest
- Any evidence of inaccuracy
- Evidence of rehabilitation
- Other mitigating factors

Employers under the FCO need to determine if the criminal history is directly related to the individual's ability to perform the job. A "directly related" conviction is defined as a conviction or unresolved arrest that has a "direct and specific negative bearing" on the individual's ability to perform the duties or responsibilities of the job. In determining whether a conviction or unresolved arrest is directly related to the employment position, the FCO requires you to consider:

- Whether the job at issue offers the opportunity to commit the same or similar offense; and
- Whether the circumstances that led to the prior conduct resulting in conviction or unresolved arrest will recur in the position.

The FAQ provides a list of the types of factors that might constitute evidence of an applicant's rehabilitation or mitigating factors.

If, after conducting this assessment, you decide not to hire an applicant based on criminal history (or take some other adverse action such as discharge or failure to promote), you must take the following steps prior to taking any adverse action:

- Provide the applicant/employee with a copy of the background check report, if any;
- Notify the applicant/employee of the proposed adverse action; and
- Notify the applicant/employee of the specific items forming the basis of the proposed adverse action.

You also need to comply with FCRA and ICRAA notice requirements. For more information, see "Obtaining Investigative Consumer Reports" on page 153Obtaining Investigative Consumer Reports.

The applicant/employee has seven days to provide you with notice that the conviction history you relied on is inaccurate, or with evidence of rehabilitation or mitigating factors. This information can be provided orally or in writing.

At this point, you must delay the adverse action for a "reasonable period" to reconsider the adverse action. Hold the position open during this process. The OLSE has not specifically defined what constitutes a "reasonable period," instead noting that it will depend upon the specific circumstances. "In general, a reconsideration period will likely be reasonable if it gives the employer an opportunity to conduct a new individualized assessment that takes into account all additional information."

If you ultimately decide to take adverse action based on the criminal history information, the FCO requires you to notify the applicant/employee of any final adverse action.

Posting, Notice and Recordkeeping Requirements

The FCO contains several notice, posting and recordkeeping requirements. Under the FCO, all job postings that are "reasonably likely" to reach a person seeking employment in San Francisco must state that the employer will consider qualified candidates with criminal histories in a manner consistent with the ordinance. Employers may not advertise that any person with an arrest or conviction record will not be considered for employment or may not apply for employment. This includes online postings.

The FCO does not limit an employer's ability to choose the most qualified and appropriate candidate among the applicants or to give preference to, or hire, an unqualified individual with an arrest or conviction record.

You must post the official FCO notice informing applicants and employees of their rights under the FCO. The notice must be posted in a conspicuous place at every workplace, job site or other location in San Francisco that is under your control and frequently visited by employees or applicants.

The notice must be posted in English, Spanish, Chinese, Tagalog and any language spoken by at least 5 percent of the employees at the workplace.

San Francisco specific posters, containing the notice in all four languages, are available for purchase on the CalChamber Store at store.calchamber.com.

In addition to posting the notice where applicants and employees can see it, the FCO also requires you to:

- Send a copy of the notice to each labor union representing its San Francisco employees; and
- Provide the notice before conducting any permissible criminal history inquiry. See "Limits on Use of Properly Obtained Criminal History Information" on page 161"Limits On Use of Properly Obtained Criminal History Information" in Obtaining Criminal History.

To meet these additional requirements, you can download the *San Francisco Fair Chance Ordinance – Notice to Job Applicants and Employees*.

You must retain records of employment, application forms and other "pertinent data and records" for a period of three years. The FAQ provides a list of the types of records that may need to be kept by an employer. It is an extensive list and should be reviewed by San Francisco employers.

The OLSE will also require you to submit an annual reporting form which will be available on the OLSE website at http://sfgsa.org/.

Protections for Applicants and Employees

You cannot retaliate against applicants/employees for exercising rights under the FCO, such as complaining about violations, participating in investigations or opposing unlawful practices. Any adverse action taken against an individual within 90 days of exercising one of these rights creates an assumption of retaliation, which you then have the burden to rebut.

There is no private right of action, but the OLSE has the authority to enforce the ordinance and refer matters to the city attorney for civil action. Administrative penalties can also be assessed for second and subsequent violations. Administrative enforcement for first offenses and during the first twelve months of the ordinance will carry less severe sanctions.

Fingerprints

Certain health-related employees must submit electronic fingerprint images to the state DOJ and are responsible for any cost associated with transmitting the fingerprint images. The following individuals are affected:

- Certified nurse assistants and home health aides
- Nursing home administrators
- Administrators, program directors and fiscal officers of adult, day health care centers
- An owner of home health agencies and private duty nursing agencies
- Anyone having a 10 percent or greater interest in the corporation, partnership or association of home health agencies and private duty nursing agencies
- Administrators of home health agencies and private duty nursing agencies

For more information, see "Keeping Fingerprints and Photographs Private" on page 139.

Investigating Wrongdoing or Harassment

The 2003 Fair and Accurate Transactions Act permits third-party workplace investigations of employee wrongdoing if they "are not for the purpose of investigating employee credit." There is no requirement for advance notice and prior consent. You need not give the employee being investigated a copy of the third-party investigator's report. If adverse action is taken, in whole or in part, based on the investigator's report, you must only provide the employee with a summary report. The summary report need not disclose the identity of the individuals interviewed or the sources that provided information used in the report.

The third-party investigations can relate only to:

- Suspected misconduct relating to employment
- Compliance with federal, state or local laws and regulations
- Compliance with rules of a self-regulatory organization
- The employer's existing written policies

The third party can provide the report only to you or your agent, or federal, state or local agencies or a self-regulatory organization with jurisdiction over you. The third party cannot give the report to other people, presumably including labor unions. Following a third party's investigation, employees against whom you have taken adverse action may argue that you must have had reasonable suspicion before ordering the investigation and/or that existing or written policies were not in place when that investigation began.

State law contains a specific exclusion for procuring investigative credit reports when you suspect the subject of misconduct or wrongdoing.[109] However, if in the course of an investigation, you make an investigative consumer report about other employees, you must provide them with the forms and notices required by law.

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[109] Civ. Code sec. 1786.16

See "Conducting Appropriate Sexual Harassment Investigations" in Chapter 27, page 811, for additional information.

Private Investigator Act

California's Department of Consumer Affairs (DCA) takes the position that, under the Private Investigator Act, any outside party hired to conduct an investigation of employee misconduct must be an attorney or a licensed private investigator. Any non-attorney or unlicensed investigator who conducts an investigation or the entity that hires him/her as an outside party is guilty of a misdemeanor punishable by a fine of $5,000, imprisonment in the county jail not to exceed one year or both fine and imprisonment.[110]

California law has always prevented other people from performing harassment investigations unless they are licensed attorneys or licensed private investigators. If you intend to engage an outside person to perform investigations, ensure he/she is properly licensed. An outside HR consultant is not legally able to perform these investigations. Using an outside HR consultant, as opposed to your HR staff, will harm the investigation results if a lawsuit occurs.

Using Social Media in the Workplace

People use technology for personal and business reasons at an unprecedented rate, and with that comes challenges for employers. Information that was once broadcast by word or written media is now instantly broadcast around the world, to the detriment of some employers and employees.

As an employer, you may want to use social media — such as Facebook, Twitter, and LinkedIn — to advertise or market products and services or to check out potential candidates. However, the use of social media can cause problems in the workplace and comes with certain restrictions. These workplace issues may include:

- Protected conduct
- Hiring problems
- Privacy concerns
- Harassment
- Discipline/termination

Restricted Access to Personal Social Media Accounts

Employers are prohibited under California law from requiring or requesting applicants or employees to disclose information regarding their personal social media accounts.[111]

In other words, an employer cannot ask a potential hire or a current employee for the password to his/her Facebook account to see information that might not be shared with the public.

This legislation was passed in response to concerns that employers were demanding access to the private, personal social media accounts of applicants or employees as a condition of hire or continued work — content that an applicant or employee has password protected and chosen not to share with the public.

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[110] Bus. & Prof. Code secs. 7520 et seq.
[111] Lab. Code section 980

Specifically, Labor Code section 980 prohibits employers from requiring or requesting an applicant to:

- Disclose a username or password for the purpose of accessing the applicant's or employee's personal social media
- Access personal social media in the presence of the employer
- Divulge any personal social media (except in limited circumstances described below).

Social media accounts can include Facebook, LinkedIn or Twitter accounts, for example. They can also include personal email accounts.

Social media accounts are defined by this law as "an electronic service or account, or electronic content," including, but not limited to:

- Videos;
- Still photographs;
- Blogs;
- Video blogs;
- Podcasts;
- Instant and text messages;
- Email;
- Online services or accounts; or
- Website profiles or locations.[112]

Employers cannot retaliate, discipline, discharge or threaten to discharge employees for not complying with their request or demand to reveal personal social media information in violation of this law. However, an employer is not prohibited from terminating or taking other adverse action against an applicant or employee if otherwise permitted by law.

Exceptions

Under this law, employers can require an employee to access, log in, or divulge personal social media in two important instances:

- Investigations
- Employer-issued devices

Investigations: California law does not affect an employer's rights and obligations to request an employee to divulge personal social media if that information is:

- Reasonably believed to be relevant to an investigation of employee misconduct or employee violation of applicable laws and regulations
- Used solely for purposes of the investigation or related proceedings[113]

Employer issued devices: An employer is still allowed to require or request an employee to disclose a user name or password or other method for purposes of accessing an employer-issued electronic device.[114]

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112. Lab. Code sec. 980(a)
113. Lab. Code sec. 980(c)
114. Lab. Code sec. 980(d)

Using Social Media as a Hiring Tool

While California law prohibits employers from requesting applicants to divulge password protected social media information, employers still have access to the vast array of public information many individuals choose to share on social media accounts. More and more employers make hiring decisions based on what they find online.

Not all social media users place strict privacy settings that block public access to their accounts; moreover, sometimes these settings change so rapidly that individuals might not be aware that what they thought was private information is actually public.

Searching online media sites may reveal relevant information about an applicant, such as awards that he/she won or articles that he/she published. But consulting these online sources presents risks.

Be careful about what types of publicly posted social media information you review and how you use this data.

Example: A Facebook profile contains an "About" section which is generally public and can include information about relationship status, date of birth, political leanings, or organizations and affiliations, such as religious organizations. Photos on the website may give information about race, sex and age. If you looked at this information and are later challenged, you will now have to explain whether you considered it in your hiring decision.

Example: The applicant uses her publicly open Twitter account to announce that she's pregnant. Now, despite your efforts to limit your interview to legally neutral questions, you suddenly know that the candidate belongs to a protected class.

Example: Private medical information is revealed on Facebook that cannot be considered during the hiring process.

You must make hiring decisions without regard to age, race, gender, familial status or any other characteristic protected by law. You cannot ask a potential employee certain questions, such as questions about pregnancy or religious affiliation. For more information, see "Interviewing Candidates" on page 29.

However, in the above examples, you now have information about an applicant that you wouldn't have known if you hadn't visited the applicant's social media page. Now, your visit to social media alone could place your company in a difficult position. You learned something about the applicant through social media that you wouldn't have otherwise known about the applicant.

In these examples, you face the risk of a discrimination lawsuit if the applicant is not offered the job. For instance, if the pregnant applicant is not hired and sues, it is likely that your company will be required to turn over all computer records relating to social media searches. This will reveal that you investigated online by visiting the applicant's social media page.

Investigating Applicants: Questions Remain

Employers want to investigate candidates as part of the hiring process. Notably, poor selection practices can lead to claims of negligent hiring. Employers can be held liable for facts that are known or "should have been known" about an employee's character or job-related information. Employers have a duty to avoid foreseeable risks of harm to employees, customers and the public.

Employers are in a difficult situation: If they look at social media information that points to a potential problem, a racist comment, for instance, what do they do with that information? If they hire the candidate anyway and the person later harasses someone at work, what is the extent of liability? Should the employer have researched further or not hired the employee? Was the employee's conduct foreseeable?

On the flip side, if the employer fails to conduct a social media search that could have easily revealed a serious problem, such as a propensity toward violence, is that also negligent hiring if the employee later injures someone at work?

Whether an employer can be held liable for not digging deep enough into a candidate's social media history as part of a background check is still uncharted territory.

Practical Actions

The best practice for employers is to avoid using social media as a background checking tool.

However, there may be situations where your company has weighed the risks and decided that using social media to screen is necessary. Even though there are risks, statistics show that many companies are using social media as one tool in the recruiting process because they believe it will provide them with valuable information in many situations.

If your company decides to include online searches as part of the screening process, some practices can help minimize risk:

- Apply social media screening practices uniformly. Don't just look at the social media files of one applicant or certain types of applicants
- Remember that hiring decision should be based on whether the applicant has the requisite skill and experience necessary to perform the essential functions of the job.
- Conduct in-person interviews first before conducting any social media screening.
- Have someone that is not involved in the actual hiring decision conduct the social media search and review the information. Information that is passed on to the hiring manager should only be that which is relevant to the job and can be legally considered. For instance, the screener would not pass on information regarding race or religion to the hiring manager, but might pass on information that shows the employee did not attend the school they listed on the job application. Train screeners on the legal criteria that can be used and what they should and should not pass on to the hiring manager.
- If you use a third party to conduct the screening, be aware of laws, such as the Fair Credit Reporting Act, that may require you to get authorization, provide notices or make certain disclosures. For more information, see "Obtaining Investigative Consumer Reports" on page 153.
- If you pass on a candidate because of job-related information that was revealed during an online search, consider allowing the applicant the opportunity to explain the content. Keep a record in case the decision is later challenged; social media information is often deleted.
- Company policies should forbid managers from considering protected classes when making any employment decision. It is important to train managers to consistently follow those policies and to make sure that managers understand exactly what type of situations can give rise to liability.
- Ensure that your hiring manager keeps notes and files demonstrating that any hiring decision was based on legitimate business reasons:
  - If you can show that your hiring decision was based on a neutral and objective evaluation of the applicant, he/she will have a more difficult time proving that your hiring decision was based on discriminatory reasons. For example, your notes and files should show that the reason you didn't hire the person was because he/she lacked specific training or skills that the job demands.
- Follow the laws relating to retaining records during the application process.

Ensure that your hiring manager and others included in the recruitment process are aware of the law prohibiting employers from requesting applicants to disclose personal social media.

For more information on hiring and recruiting practices, see Chapter 3, “Recruiting and Hiring.”

Social Media and Employee Discipline

Employers need to be aware of how social media can intersect with the day-to-day management and discipline of employees.

Employees often talk shop during and after work hours. In the past, a typical example was employees gathered around the water cooler and complaining about their supervisor. Now, that water cooler conversation might take place on Facebook, Twitter or some other social media outlet. This can create problems for an employer, especially if an employee discloses a trade secret or identifies himself/herself as an employee of your company when posting a potentially controversial statement. This may also cause problems if an employee uses social media to harass another employee.

These social media conversations may occur on- or off-duty and may be shared with employees, former employees and/or the general public. Some of the disciplinary issues that often arise include:

- Whether the social media conversation is protected
- Whether the social media conversation is used to harass or discriminate against other employees
- Whether any privacy issues are involved

Protected Conversations

Employees have the right under both the California Labor Code and the National Labor Relations Act (NLRA) to discuss their working conditions, pay or other work-related issues. For more information, see “Social Media Use and Unfair Labor Practice Charges” in Chapter 31, page 961. While your initial reaction might be to discipline or terminate employees who use social media to criticize your company, you will need to first consider whether the employee's conversations are protected.

Exercise caution and consult with counsel when considering adverse action against an employee due to comments he/she made on any Internet or social media forum.

California law prohibits employers from disciplining employees for discussing their salary and working conditions.[115] In the context of social media usage, this means that if an employee on Facebook asks co-workers how much they earn, the employer cannot discipline the employees involved in that conversation in most circumstances. For more information, see “Protection for Discussing Working Conditions” in Chapter 26, page 753.

Furthermore, employers must remember that whistleblower protections shield certain statements that employees make. For example, the California Labor Code prohibits employers from retaliating against any employee who discloses information to a government or law enforcement agency (or to internal individuals with authority over the employee or authority to investigate, discover or correct violations) about what he/she reasonably believes to be a violation of state, federal or local statute, rule or regulation.[116] For more information, see “Whistleblower Protections” in Chapter 26, page 707.

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[115] Lab. Code secs. 232; 232.5

[116] Lab. Code sec. 1102.5

Certain sections of the NLRA also affect employer social media policies and disciplinary practices, **even in private, nonunion workplaces.**

Sections 7 and 8(a) of the NLRA prohibit union and non-union employers from restricting or chilling the rights of employees to engage in concerted activities, such as discussing wages, work conditions and other terms of employment.

An employee who uses social media to complain that his/her wages are too low, that the employer is violating labor laws or to discuss other conditions of employment may enjoy NLRA protection and you may be prohibited from disciplining that employee. For instance, if an employee goes on Twitter to complain about bonuses and other employees join in on the Twitter conversation, that social media activity may be protected under the NLRA.

The National Labor Relations Board (NLRB) has taken action against employers for terminating employees who posted negative comments about supervisors or about the company on the employee's personal social media pages (such as Facebook).

However, an employee who simply rants about a supervisor with no complaint about improving working conditions may not be protected.

Guidance from the NLRB's Office of General Counsel has indicated that an employee's comments on social media are generally not protected if they are mere individual gripes or attacks not made in relation to shared employee concerns over terms and conditions of employment.

The NLRB made its position clear: employees who discuss working conditions with other employees on social media websites have the right to engage in those discussions without being disciplined.

For information on social media and employer policies, see "Social Media and Employer Policies" on page 172.

Examples of Protected Social Media Conversations

In the following situations, the NLRB found that the employee's social media conversations were protected and that the employer should not have disciplined the employee:

- An employee's Facebook post complained about not getting paid on time; several other employees joined the conversation in the post.
- Employees responded to a co-worker post that the employer had incorrectly withheld taxes from their paychecks. One employee left a Facebook comment; the other employee clicked the "Like" button. The Facebook comments included profane language criticizing the owners.[117] The Second Circuit upheld the Board's decision.[118]
- Five employees made Facebook complaints about staffing levels and that the employer was not doing enough to help its non-profit clients.[119]
- Vulgar Facebook postings about a manager were made prior to a union election, but the postings also encouraged voting for the union.[120]
- A car salesman complained on Facebook that serving hot dogs and water at a promotional event would negatively affect commissions.[121]

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[117] *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014)

[118] *Three D, LLC v. National Labor Relations Board*, 2015 WL 6161477 (2015)

[119] *Hispanic United of Buffalo*, 359 NLRB No. 37 (2012)

[120] *Pier Sixty, LLC*, 362 NLRB No. 59 (2015)

[121] *Karl Knauz Motors, Inc. d/b/a Knauz BMW and Robert Becker*, 358 NLRB No. 164 (2012)

- Some employees complained on Facebook about their store's closing time because the store was in an unsafe neighborhood.[122]

Examples of Unprotected Social Media Conversations

In other situations, the NLRB found that employee social media conversations were not protected and that the employer's discipline of the employee was lawful:

- In a case involving threatening activity, the NLRB found that employee action was not protected. An employee asked to leave early, but was not allowed to under the attendance policy. The employee posted that he "was about a hair away from setting it off." No employees responded to the post, and he claimed it was venting. The employer fired the employee for inappropriate, threatening and violent statements.[123]
- Two employees of a neighborhood center engaged in a Facebook conversation detailing specifically how they would act in detriment to the employer's interests by teaching kids how to "graffiti up the walls," "have parties all year" and "field trips all the time to wherever ... we want." The center rescinded these employees' offers for employment for the next school year. The NLRB ruled in favor of the employer, finding that the company did not have to wait for the employees to actually act on the insubordination, and that the employees' egregious conduct had lost the protection of the NLRA.[124]

Harassment and Discrimination Issues

Social media usage by employees can also give rise to disciplinary issues if the social media posts violate your policies against harassment and discrimination. Unfortunately, social media gives employees another way to harass or discriminate against co-workers. For instance, not only can an employee harass a co-worker in person, the employee can "tweet" harassing comments about the co-worker during off-work hours.

> **Example:** Two co-workers become Facebook friends. Everything is fine at first. But after a while, the male begins to post sexually suggestive messages on the female's Facebook page. She complains to management that the co-worker is harassing her online and during off-work hours.

As the employer of both people, what's your level of responsibility? Social media can be misused by your employees in their off-hours in ways that could be interpreted as harassing behavior. Understand that the federal Equal Employment Opportunity Commission has accepted discrimination and harassment cases stemming from social media, and state law would apply the same principles.

If you knew of the harassing or derogatory information or if the harassing employee was using employer-owned devices or accounts, you can be held liable.

Make sure that your anti-harassment and anti-discrimination policies clearly state that harassment, disrespectful or unprofessional conduct of any type will not be tolerated.

Also include language in your electronic media and Internet usage policies specifically stating that it is a violation of company policy to use the Internet (including social media sites) to sexually harass or discriminate against employees.

Privacy Concerns

California law broadly prevents employers from intruding into employees' legal off-duty conduct. The U.S. and California constitutions also create privacy rights for individuals.

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[122] *Design Technology Group LLC*, 358 NLRB No. 96 (2013)

[123] *Frito-Lay Inc., Case* No. 36-CA-10882 (2011)

[124] *Richmond District Neighborhood Center and Ian Callaghan*, 361 NLRB No. 74 (2014)

You can discipline employees if the off-duty conduct is illegal; if it presents a clear conflict of interest to the business; or if it adversely affects the employee's ability to do his/her job. The issue arises as to how much privacy an employee has with regard to his/her personal social media accounts and the ability to obtain this information for disciplinary purposes, especially in light of legislation relating to employees' personal social media accounts. For more information, see "Restricted Access to Personal Social Media Accounts" on page 164.

> **Example:** A supervisor is friends with a female subordinate on Instagram and discovers a scantily clad picture of her at a party, beer in hand. Even though risqué photos posted on a person's social media account page may reflect on an employee's judgment, in many instances they are irrelevant to the employee's work performance.
>
> An employer can't simply terminate an employee for a post or personal photos that the employer doesn't like. The employer must take into account the individual's rights to privacy and to engage in lawful off-duty conduct.

Employers should also be aware of medical privacy laws.

> **Example:** A federal court found that an employer may be liable for Facebook comments one employee made about another employee's medical condition. An employee, George Shoun, took time off work for a workplace shoulder injury. The employee who processed Shoun's workers' compensation claim posted information on her personal Facebook page discussing how long Shoun had been out on workers' compensation and comparing him to an employee who had heart surgery but was back quicker. Shoun sued under the ADA, claiming the company deliberately disclosed his medical condition. The court allowed Shoun to proceed with his claim under the ADA.[125]

An employer can take steps to avoid invasion of privacy claims resulting from employees' social media use:

- Limit the amount of information you collect about employees and implement measures to protect confidential information.
- Consider whether it is in your best interest to befriend a subordinate employee on a social media website.
- Refrain from viewing an employee's Facebook or other social media pages.
- If you can show a legitimate business purpose for investigating an employee, make sure your investigation doesn't unlawfully invade that person's privacy, and that it complies with state and federal laws.
- Use an experienced, internal HR manager to conduct any investigation and consult legal counsel before beginning the investigation:
    - You can also consider hiring a third party to conduct the investigation. However, make sure the third party is either a licensed attorney or a licensed private investigator and follows all state and federal laws.
- Make certain that you follow all notice and disclosure obligations when conducting investigations.

Employers should consult with counsel or an experienced HR professional when considering taking adverse action against an employee due to postings he/she made on the Internet or any social media forum.

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[125] *Shoun v. Best Formed Plastics, Inc.* 2014 28 F.Supp.3d 786 (N.D. Ind. 2014)

Social Media and Employer Policies

Well-drafted electronic media/Internet policies can help protect businesses from problems associated with social media. These policies should address social media use and be part of an employee handbook.

Employer policies should discuss the appropriate and inappropriate uses of social media on company-provided equipment during work hours. The policies should cover the use of electronic devices, such as computers, laptops and smart phones, in the workplace. Be clear about what information may be accessed and when. Also, be clear about your monitoring practices. For example, an employee's expectation of privacy will be diminished if you have informed him/her that you monitor employer accounts or employer provided equipment.

You need to be mindful of your company's overall approach relating to these issues. Some companies take a fairly flexible approach to social media usage, while others take a more restrictive approach.

Create clear policies about social media use as it relates to your organization. Include these policies in an employee handbook. Consult legal counsel.

Social Medial Policies Cannot Prohibit Protected Conversations

Employers must be cautious about the wording of these policies. The NLRB has not only overturned employers' decisions to discipline for social media posts, but has also taken issue with the underlying policies relied on by the employer as a basis for the discipline, especially those that might infringe on an employee's ability to discuss work conditions.

The NLRB has indicated that it will examine whether an employer's policies would reasonably tend to chill an employee's ability to discuss his/her working conditions.

According to the NLRB, "[e]mployer policies should not be so sweeping that they prohibit the kind of activity protected by federal labor law, such as the discussion of wages or working conditions among employees." As mentioned, these rules apply regardless of whether you have a unionized workplace.

In the NLRB's third report concerning social media cases, the NLRB considered numerous cases involving employers' social media policies. The NLRB found the majority of the policies to be unlawfully broad.

Example: An employer's policy that prohibited employees from using social media to engage in "unprofessional" communications that could negatively impact the employer's reputation or interfere with the employer's mission was found to have violated the NLRA.

Example: An employer's Internet/Blogging policy that discouraged online communications involving "inappropriate discussions about the company, management and /or co-workers" was found to have violated the NLRA because employees could reasonably interpret it as "proscribing any discussions about the terms and conditions of employment [that the employer] deemed 'inappropriate'."[126]

For more information, see "Social Media and Employee Discipline" in Chapter 8, page 168 and "Social Media Use and Unfair Labor Practice Charges" in Chapter 31, page 961.

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[126] *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014)

Drafting Social Media Policies

Employers can follow several best practices in drafting and implementing social media policies:

- Coordinate with all departments: human resources, legal, IT and sales/marketing.
- Reduce employees' expectation of privacy for use of employer-owned devices or accounts and for access during working time. Provide advance notice of any monitoring practices that your company uses. Also make certain that your monitoring practices are clear and specific. Monitoring should be done in a reasonable manner that protects the company's legitimate business interests.
- Take care that the wording of your policies does not limit an employee's right to discuss the terms and conditions of employment, such as discussions regarding wages and working conditions.
- Be specific. For instance, it is acceptable to prohibit employees from using social media to discuss company trade secrets or to sexually harass other employees. However, prohibiting employees from discussing "non-public" information is considered unlawfully overbroad by the NLRB because it could be interpreted to prohibit discussion of wages.
- Avoid broad language that prohibits employees from discussing "inappropriate," "unprofessional" or "disparaging" information about the company on social media sites without providing specific examples.
- Remember that employees have the right to discuss working conditions during non-work times and in non-work areas. A policy that prohibits employees from posting to social media with their personal cell phones during breaks may be considered unlawfully overbroad.
- Address the use of company name, logos and trademarks.
- Discourage "friending" on social network sites between supervisors and employees.
- Consider inserting what is often called a "savings clause" into your social media policy: a clause that clearly states that nothing in the policy is intended to chill the employees' rights to discuss the terms and conditions of employment or engage in activity protected by state or federal law. This will not, according to the NLRB, cure an overbroad policy, but if the policy also provides specific examples, it can help. The key is whether your policy provides enough clarity so an employee will know that he/she can still talk about working conditions.
- Communicate the policy.
- Monitor compliance with the policy.
- Be careful not to enforce your social media policy in a way that would violate an employee's rights to engage in protected conduct.

Because of the rapid changes in this area of the law, CalChamber recommends that employers consult legal counsel with any questions regarding drafting a social media and Internet use policy.

A sample social media policy — along with many more — is available as part of CalChamber's ***Employee Handbook Creator***. Visit our online store at store.calchamber.com to find out more about how to easily create your employee handbook.

Company Social Media Accounts

Many companies have a presence on Twitter, LinkedIn, Facebook or a blog to engage current customers and reach out to new ones.

If your company maintains its own social media account, you will also want to set guidelines. There may be issues regarding who owns your social media account if, for instance, your chief social media author leaves employment and tries to take the social media accounts with him/her. The employer may have claims relating to trade secrets and misappropriation.

On the other hand, employees may also have claims. In one case, a director of marketing created a company blog, a company Facebook page from her personal Facebook account and a personal Twitter account that she used to promote the company. She kept all log-in information on a spreadsheet on her work computer.

While the employee took a medical leave, the company maintained the social media accounts and made posts to her Twitter account and accessed the company's Facebook page through her personal account. The employee sued pursuant to the Stored Communications Act.[127]

The court allowed the employee to proceed with her claim and recognized that the Stored Communications Act provides "a private cause of action for unauthorized, intentional access to communications held in electronic storage."

Without carefully drafted employer guidelines regarding company social media, ownership issues may arise.

In addition, the Federal Trade Commission (FTC) issued revised *Guides Concerning the Use of Endorsements and Testimonials in Advertising*. The FTC's guides address endorsements by consumers, experts, organizations and celebrities. The revised guides also add requirements that mandate that "material connections" between advertisers and endorsers must be disclosed. Material connections include payments or free products. The FTC's reasoning is that consumers would not expect these connections to exist.

These examples define what constitutes an endorsement when the message is conveyed by bloggers or other "word-of-mouth" marketers. The revised guides stipulate that, although the FTC will issue decisions on a case-by-case basis, the post of a blogger who receives cash or in-kind payment to review a product is considered an endorsement. Bloggers who make an endorsement must disclose their material connection with the seller of a product or service.

Consider the following best practices:

- Clarify that the company owns, operates and manages the accounts. Have users set up the accounts with company email, etc., and require users to provide IT with password/log-in information.
- Define roles of social media users, rules, reporting structures, reviewing and editing procedures, and monitoring.
- Consider creating separate policies for job-related, required use of social media and personal use.
- Inform your employees that they should not post testimonials or endorsements about your company or any of its products or services on social media websites without disclosing their relationship to your company.
- Consult with legal counsel to draft a clear policy that balances the FTC guidelines against employees' freedom of speech and privacy rights.

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[127] *Maremont v. Susan Freedman Design Group, Ltd.* 2014 WL 812401 (N.D. Ill. 2014)

Monitoring Employees

Concern over inventory loss, customer service, drug and alcohol abuse, misuse of company facilities and equipment and illegal activity on company premises created an increasing desire to conduct surveillance in the workplace. New technologies replace the one-way mirror and the surveillance station of days past, but also prompt employee privacy concerns.

Shopping Investigations

You can hire "shopping investigators" to test employees' integrity and review sales techniques and service. Before discharging or disciplining an employee on the basis of a shopping investigator's report, you must provide the employee with a copy of the report. During an interview that might result in terminating an employee for dishonesty, you must give the employee a copy of the latest investigation report on which the interview was based. You are excused from these requirements if the shopping investigator is employed exclusively and regularly by you and the entire investigation is conducted solely for you.[128]

Electronic Surveillance

Consult with counsel before using cameras to electronically monitor employee activities. At a minimum, you must notify employees that cameras have been installed and obtain their written consent to be monitored. In addition, never place cameras in an area where employees legitimately expect privacy, such as restrooms or changing areas.

California law prohibits public and private employers, except the federal government, from making audio or video recordings of employees in restrooms, locker rooms or rooms designated by the employer for changing clothes, unless authorized by a court order. You cannot use recordings made in violation of this law for any purpose.[129]

The case of *Hernandez v. Hillsides Children Center Inc.* offers some guidance about video taping and privacy in the workplace.[130] The court ruled that employees had a reasonable expectation of privacy in their office space, but that the company's surveillance to investigate misuse of property did not invade employee privacy.

The court agreed with the employer's assertions that it took special care to avoid video taping the two women during work hours and that level of care was inconsistent with an intrusion that would be highly offensive to a reasonable person. The court disagreed with the employees' argument that the employer was required to use less obtrusive means of investigating the misuse of company computers. However, the court did state that nothing in its opinion was meant to encourage the type of surveillance measures used by Hillsides, particularly the surveillance without prior notice to employees.

Employers who want to monitor employees should consult with legal counsel before doing so.

Union Employee Rights and Electronic Surveillance

In *Cramer v. Consolidated Freightways, Inc.*, the Ninth Circuit Court of Appeals ruled that, when an employer violates state privacy laws by secret surveillance, union employees can sue for invasion of privacy regardless of the terms of their collective bargaining agreement (CBA). The CBA in question allowed video cameras to prove employee theft or dishonesty.

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[128] Lab. Code sec. 2930

[129] Lab. Code sec. 435

[130] *Hernandez v. Hillsides Children Center Inc.*, 47 Cal. 4th 272 (2009)

The Ninth Circuit Court of Appeals determined that the provision in the CBA allowing video cameras had no bearing on "secret spying on Consolidated's employees in company restrooms — no matter how well-intentioned Consolidated's alleged purpose may have been in doing so."[131]

Secret Videotaping in Open Workplace

In *Sanders v. American Broadcasting Companies*, the California Supreme Court held that a journalist secretly videotaping an employee in an open workspace constituted an invasion of privacy.[132] The secret videotaping in that case was done as a part of an undercover investigative report on "tele-psychics" by a television reporter in a workplace with low, open cubicles where conversations could easily be overheard by anyone in the room.

The court concluded that the fact that a workplace interaction might be witnessed by others on the premises does not eliminate an employee's reasonable expectation of privacy. In an office or other workplace to which the general public does not have free access, employees enjoy a limited, but legitimate, expectation that their conversations and other interactions will not be secretly videotaped by undercover television reporters, even though those conversations may not have been completely private from the participants' co-workers.

Property Searches

California courts have not defined the extent of an employee's right to privacy in the area of employer-owned property used exclusively by the employee. Existing case law appears to suggest that the privacy provision is not intended to protect employees from searches of company-owned property such as lockers, desks and vehicles. For more information on searching an employee's computer, see "Computers and Privacy" on page 178.

An employer's search of employee property brought onto company premises more closely approaches invasion of a constitutional privacy interest. The scope of a potential privacy right in these circumstances hinges on an objective assessment of the employee's expectation of privacy. Nonetheless, the employee's privacy interests may be outweighed by the employer's interest in the productivity and well-being of the workforce, and security of the premises.[133]

If you want to conduct searches, follow these precautions to minimize exposure to liability for inappropriate searches:

- Maintain keys or combinations to each desk, vehicle or locker used by employees on company property. Notify employees about this.
- Disseminate written policies about your right to conduct searches of lockers, desks, vehicles, etc., to all employees. Obtain employees' acknowledgment of receiving and reading these policies.
- Provide notice to employees that pockets, purses, lunch boxes, tool kits, etc., may be searched. Obtain employee consent before any search is conducted.
- Supply all locks used on company property. Forbid employees from using their own locks.
- Conduct searches in an evenhanded and nondiscriminatory manner.
- Do not proceed with the search if the employee credibly denies knowledge of your search policy.

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[131] *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683 (9th Cir. 2001)
[132] *Sanders v. American Broadcasting Companies*, 20 Cal. 4th 907 (1999)
[133] *O'Connor v. Ortega*, 480 U.S. 709 (1987)

Even if you take all of these precautions, litigation and liability can arise from any search, particularly given the unsettled state of the law in this area. Check with a competent labor and employment law attorney before engaging in any search activities.

Establishing Company Property and Privacy Policies

Establish a policy that addresses company-provided property. A property and privacy policy will help avoid claims that you committed an invasion of privacy by searching the property. For example, if you review email messages received or sent by employees using a company email account, the privacy policy becomes useful when you must address potential theft or require monitoring or investigating an employee's use of the property.

An employer property policy is available as part of CalChamber's ***Employee Handbook Creator***. Visit our online store at store.calchamber.com to find out more about how to easily create your employee handbook.

Your property policy should:

- List all company-owned facilities and property available for the employees to use (for example, desks, computers and so on).
- State that the property belongs to the company.
- State that company property is subject to inspection by the company at any time.
- List when employees can and cannot use your property. For example, you can state that employees cannot use copiers for personal reasons, such as copying flyers for a non-company activity.

Telephone, Voice Mail and Email Monitoring

The incredible expansion of information technology in the workplace over the last several years opened a Pandora's box of legal issues for employers. The typewriter with carbon paper and the telephone message pad have been replaced by computers, voice mail and email. With these modes of communication come questions about employee privacy and employer security.

The law in this area continues to take shape. This section addresses the issues created by workplace technology and the current state of the law as it applies to these issues.

Civil Electronic Privacy Statutes

The Electronic Communications Privacy Act (1986) gives an employer who maintains email and/or voice mail systems the right to access those systems.[134] This right does not exist under the Act if the systems are provided by an outside entity. Certain unauthorized disclosures are prohibited by the act. Disclosure can be made only to:

- The addressee or intended recipient
- An agent of the addressee or intended recipient
- Other people, with the consent of the originator, addressee or intended recipient

The Omnibus Control and Safe Streets Act regulates the interception of wire, electronic and oral communications.[135] It prohibits the intentional interception of any communication through the use of any electronic, mechanical or other device. However, merely retrieving information after

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134. 18 U.S.C. 2701

135. 18 U.S.C. 2510

transmission has ceased probably would not be considered an interception of information.[136] That is, you might be allowed to listen to or read the transmission after it has been made.

An employee can give consent, either explicitly or implied, to an otherwise impermissible monitoring of a communication. The courts are split on what constitutes an implied consent, and often will look to the way a company sets forth and applies its policies relating to privacy.[137] The court can find implied consent if a well-known monitoring and access policy exists and you consistently enforce the policy against use of your communication devices for personal reasons. On the other hand, courts might not find implied consent where an employee has consented to your policy of monitoring business calls but not personal calls.

The Act does not prohibit intercepting communications by telephone or related equipment being used in the ordinary course of business. This exception allows you to monitor your employee's telephone calls for customer service or training purposes. Monitoring voicemail messages is probably not a prohibited interception, because voicemail systems rely on telephone equipment. However, monitoring email messages probably would not fall under this exception. Be aware that the courts determine the question of whether a particular message was monitored "in the ordinary course of business" on a case-by-case basis. Standards for making this determination vary among the courts.

Criminal Electronic Privacy Statutes

In addition to the federal civil statutes, California places criminal sanctions on people who engage in wiretapping or various related activities. Activities prohibited include:

- Intentional wiretapping
- Willfully attempting to learn the contents or meaning of a communication in transit over a wire
- Attempting to use or publicize information obtained in either of the above ways[138]
- Eavesdropping on or recording confidential communications[139]
- Disclosing the contents of a telegraph or telephone message by a person other than the addressee without permission of the addressee[140]

In general, eavesdropping is prohibited under these statutes only if done while the message is in transit. Therefore, listening to voicemail messages once recorded or reading sent email messages should limit exposure to criminal penalties.

Listening to or recording confidential communications is prohibited if either party to the conversation expects it to be private. Outgoing voicemail messages should not indicate that the caller can "leave a private message," and might even go so far as to state that incoming messages may be monitored by the company. You should warn all email users in writing that you do not guarantee email communications to be private and that you can access them. Your best defense is to clearly inform employees and all others using your electronic communication systems that they should not expect communications to be private.

Computers and Privacy

You have the right to monitor Internet access and examine any content on a computer used by an employee if you supply the computer.

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[136] *United States v. Meriwether*, 917 F.2d 955 (6th Cir. 1990)
[137] *Simmons v. Southwestern Bell Tel. Co.*, 452 F. Supp. 392 (W.D. Okla. 1978)
[138] Penal Code sec. 631; *Warden v. Kahn*, 160 Cal. Rptr. 471 (1979)
[139] Penal Code sec. 632
[140] Penal Code sec. 637

The case of *TBG Insurance Services Corp. v. The Superior Court of Los Angeles County* offers some guidance on creating policies governing use of business computers, email and Internet access.

TBG Insurance Services Corporation terminated an employee for accessing pornographic websites on his computer at work. TBG requested a court order requiring the former employee to turn over a computer provided by the company for home use. The company wanted to discover if the employee used the home computer for similar purposes. The employee agreed to return the computer, but wanted first to delete personal information he and family members placed on the hard drive, which he claimed was covered by the California Constitution's right to privacy.

The court rejected the employee's claim. The employee signed an agreement to be bound by the company's computer use policy that said computers were provided for business purposes and not for personal use unless explicitly approved. Company policy also prohibited computer use for obscene purposes and included a consent to company monitoring as needed. The court said the employee could not have had any reasonable expectation of privacy.[141]

It is unlawful for any elected state or local officer, including any state or local appointee, employee or consultant, to knowingly use a state-owned or state-leased computer to access, view, download or otherwise obtain obscene matter, as defined in the Penal Code.[142] The law does not apply to accessing, viewing, downloading or otherwise obtaining obscene matter for use consistent with legitimate law enforcement purposes; to permit a state agency to conduct an administrative disciplinary investigation; for legitimate medical, scientific, academic or legislative purposes; or for other legitimate state purposes.

Policy Sets Forth Privacy Expectation

In *Holmes v. Petrovich Development Company*, Gina Holmes used her employer-provided email account and employer-provided computer to consult with her attorney about a potential lawsuit against the employer.

Holmes claimed that the emails fell under confidential attorney-client communications. The court disagreed, ruling that Holmes did not have a reasonable expectation of privacy in her emails with her attorney because of the company's strictly worded technology resources policy.

This policy plainly stated that employees had no right of privacy with respect to personal information or messages created using company technology.

The policy further stated that email was not a private communication and that the company had the right to monitor email usage. The policy warned employees that email should be regarded as a "postcard rather than as a sealed letter."[143]

Why You Need a Computer Use Policy

The case *LVRC Holdings, LLC v. Brekka* demonstrates the need for clear computer use policies. In this case, the employer authorized an employee performing Internet marketing for the company to use the company's computer network. The employee lived out of state, but was often in the employer's office and he would email information from the company computer to his personal computer to work on later. The company assigned a user name and password to the employee to use when accessing the company's website.

When the employment relationship ended, an employee discovered that someone had logged into the company's network using the ex-employee's user name and password. The company brought suit claiming that the ex-employee violated the federal Computer Fraud and Abuse Act (CFAA), when he emailed company documents to himself, prior to leaving the employer.

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[141] *TBG Insurance Services Corp. v. The Superior Court of Los Angeles County*, 96 Cal. App. 4th 443 (2002)

[142] Penal Code secs. 311-312

[143] *Holmes v. Petrovich Development Company, LLC*, 191 Cal. App. 4th 1047 (2011)

The court held that a person uses a computer "without authorization" under CFAA when someone has not received permission to use the computer for any purpose or when permission to access the computer is rescinded and the person continues to use the computer anyway.

Because the company permitted the employee to access its computer, and because the employee was still working for the company when he emailed company documents to himself, the employee's use during employment was authorized under the CFAA.

There was no proof that after the employment relationship ended, it was the former employee who used the user name and password to access the company website. However, if the company could have proved that it was the former employee using the login information, the access would be unauthorized under the CFAA because permission to access had been rescinded.

Develop clear policies and guidelines about computer access and communicate them to all employees. Inform employees of your right to access email, Internet usage and history and any content on the computer. Inform your IT department of terminations so that they can prohibit future access by ex-employees.[144]

Electronic Media Use Policy

Electronic media includes computers, software applications, handheld devices, etc. Creating a policy about the use of electronic media prevents employee misuse. This, in turn, helps avoid claims that you committed an invasion of privacy by searching the media.

Your policy should:

- List the electronic media that your company uses.
- State that the media belongs to the organization.
- State that the media communications and files are subject to inspection by the company at any time.
- Inform employees that electronic media must only be used for company business.
- State that employees cannot use these media in any manner that conflicts with your discrimination and harassment policies.

Internet Access Policy

Implement a policy for appropriate use of the company's resources to access the Internet. Set guidelines for Internet access during working hours and for employees who are allowed Internet access for personal use during breaks, meal periods and other non-work time. The policy should also clarify disciplinary procedures for personal use of the Internet during work times and detail proper and improper use of Web browsers.

Include language telling employees that they should have no expectation of privacy regarding communications sent and received through the company's email and/or intranet, nor should they expect privacy when accessing the Internet. This includes employee's personal electronic devices that use organization servers to access the Internet or send and receive email or text messages.

Many employers also include a policy about the safe use of company cell phones and limitations on their use for personal business.

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[144] *LVRC Holdings, LLC v. Brekka*, 581 F.3d 1127 (9th Cir. 2009)

An employer electronic media and internet access policy is available as part of CalChamber's ***Employee Handbook Creator***. Visit our online store at store.calchamber.com to find out more about how to easily create your employee handbook.

Keep in mind that electronic media and Internet access policies should not be enforced in a manner that would limit an employee's right to discuss the terms and conditions of employment, such as wages and working conditions. These discussions are generally protected under California law and Section 7 of the National Labor Relations Act. For more information, see "Protected Concerted Activity in Union and Non-Union Workplaces" on page 950.

Privacy and Text Messaging

The U.S. Supreme Court ruled in favor of an employer in *City of Ontario v. Quon*. The case involved the employer's review of text messages stored on a third party's server. The employer's policy about Internet use included the right to monitor all network activity, including email, with or without notice. The policy did not specifically mention text messages. However, the employer made it clear that text messages would be treated the same as email.[145]

An employee, Quon, who consistently exceeded his monthly text message allowance reimbursed the employer for the overage. However, the supervisor became tired of collecting money for the overage and obtained transcripts of the text messages. It was apparent that some of the messages were not work-related and contained sexually explicit material.

After an investigation, the employee was disciplined and the employer was sued. The case was eventually heard by the U.S. Supreme Court, which held that the employer's search was reasonable and did not violate the employee's rights. The Court noted that the search was limited to a short period of time and only messages sent during Quon's actual work hours were audited. The employer found 456 messages sent during Quon's work hours for the two month period. Of these, only 57 were work-related.

Though the case deals with a public employer's search, it is pertinent for private employers as well. The Court found that in the private sector, such a search would have been reasonable. The facts in this case are specific; it is unknown how a California court would rule on the "reasonable expectation of privacy" standard that applies to private sector employers.

This case emphasizes the necessity of having a well-communicated policy about email, Internet, voice mail and other communication devices and sources that record or store information.

Protecting Company Property

In *Intel Corporation v. Hamidi*, a company's effort to prevent a former employee from using the company's email addresses to distribute email messages critical of the organization's policies to other employees was rejected by the California Supreme Court.

Over a period of approximately two years, an ex-employee sent a total of approximately 200,000 email messages to large numbers of former co-workers criticizing the organization's personnel practices. There was no breach of any security barriers or damage to or network disruption. The sender complied with employee requests to be removed from his mailing list, but he rejected company requests that he stop his disruptive email messages. The company sued, alleging trespass to the corporate computer network.

The California Supreme Court rejected the trespass theory, saying that the organization failed to show that the email messages damaged its network or interfered with the property's use or possession. According to the Court, the loss of employee productivity resulting from the controversial content did not injure the organization's interest in its network.

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[145] *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010)

The California Supreme Court observed that its decision is not intended to grant senders any special immunity from liability for the message content, such as defamatory statements.[146]

The decision underlines the importance of taking all necessary steps to secure your electronic communication systems, data and address books. Publish policies that limit employee use of organization computers and networks to matters reasonably related to organization business and forbid transmission of inappropriate messages that offend or harass others.

Advise employees that they should have no expectation of privacy with regard to messages sent using the organization's network and that you have the right to monitor messages to ensure compliance with organization policies.

Balancing Privacy and Business Needs

To help balance your employees' rights to privacy with your company's legitimate business needs, review and carry out these four steps.

1. "Provide Advance Notice of Workplace Privacy" on page 182
2. "Obtain Consent to Access Private Information" on page 182
3. "Have a Legitimate Business Purpose to Search" on page 183
4. "Seek Advice of Counsel When Privacy Is an Issue" on page 183

Provide Advance Notice of Workplace Privacy

Provide advance notice of what employees can and cannot expect to remain private in the workplace. Reducing the expectation of privacy is your best defense against allegations of invasion of privacy. If you provide employees with computers, laptops, cell phones, mobile devices, etc., for company use, you must maintain a written policy about their use. Just as you may want to search, with or without notice, company property such as desks, lockers, voice mail and email, you may want to monitor or audit other company property, or limit the use to business-related matters.

A written policy about use of company property, including electronic devices, provides advance notice to employees that any messages created, sent, received or stored on these devices are the property of the company and that the organization can access them at any time.

Obtain Consent to Access Private Information

In addition to providing advance notice, obtain consent from employees to search or access information stored in email or voice mail.

Obtain consent in writing in advance. Keep on file a written acknowledgment from each employee that he/she has received, read and understood the company's policy about access to electronic information. If your employee handbook includes an electronic information access policy, you can include this acknowledgement in the general acknowledgment of receipt for employee handbooks. You can also create a separate document entirely.

In addition, it is best to obtain consent from an employee at the time you access electronic communications. Of course, this is not always possible because you can legitimately need to access information when the employee is not available to give consent, perhaps when the employee is on vacation or on a lunch break.

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[146] [illegible]

Have a Legitimate Business Purpose to Search

The U.S. Supreme Court's "reasonableness test" has been used to balance legitimate business needs with a public sector employee's expectation of privacy in his own office.[147] Though *O'Connor v. Ortega* applies only to public sector employers, it is a good indication of the test that courts will likely apply to private sector employers. The test focuses on whether:

- Reasonable grounds exist for suspecting that the search will reveal evidence of work-related misconduct
- The search is necessary for a non-investigative, work-related purpose, such as looking in an employee's desk to find a work-related document on a day that the employee is out sick
- The search's scope was reasonably related to the search's objectives and not excessively intrusive in light of the nature of the suspected misconduct

A federal court applied this test to workplace technology in *Williams v. Philadelphia Housing Authority*. In that case, a supervisor removed a computer disk from a public employee's desk while he was on leave. The supervisor then read the information on the disk to locate work-related documents and discovered it also contained personal documents. The court held that it was not unreasonable for a supervisor to enter an employee's office to retrieve important work-related materials while the employee was on leave. Review of the personal documents on the disk while searching for work-related material was not considered unreasonable.[148] Though this case dealt with a public employer, it is an excellent example of how the courts will balance competing rights and will likely become part of the precedent applied to private sector employers.

Seek Advice of Counsel When Privacy Is an Issue

Most employees are well aware of the right to privacy guaranteed them by the California Constitution. When an employee feels that right has been violated, litigation often follows. Consult counsel in any situation where privacy is an issue, such as when an employee is suspected of misconduct warranting an investigation. Also consult counsel when creating a policy relating to employee privacy issues. The law in this area remains unsettled and constantly changes.

Responding to Reference Checks

The law makes it clear that you can communicate information on the job performance or qualifications of a current or former employee upon the request of a prospective employer. The law specifically provides protection from claims of libel or slander when you respond to an inquiry as to whether you would or would not rehire a current or former employee.[149] In addition to the protections offered by this law, you can lessen exposure to liability by establishing uniform procedures for responding to requests for information.

Some companies set a policy of not providing references at all. This is not a wise choice, as it could lead to liability if a former employee has been terminated for violence or is known to be violent. If that employee is hired by another company and commits a violent act on the job, your company could be liable for failing to provide information that could have prevented the incident.

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[147] *O'Connor v. Ortega*, 480 U.S. 709 (1987)

[148] *Williams v. Philadelphia Housing Authority*, 826 F. Supp. 952 (E.D. Pa. 1993)

[149] Civ. Code sec. 47(c)

General Policy Guidelines for Responding to Reference Checks

Follow these guidelines when developing reference check policies:

- Determine who in your company will respond to reference requests. Train supervisors to direct any reference requests to that individual.
- Be consistent when providing employee references. Your policy should name certain individuals within the company who are authorized to provide references. Managers and supervisors should understand that all requests for references must be directed to those with authority to provide the information.
- Create a waiver for former employees to sign at the time employment ends if they want you to release information to potential future employers.
- Do not provide standardized letters of reference to former employees. If you want to provide a letter of reference, draft it to reflect the facts about the specific employee's performance.
- Verify a caller's identity before providing any references by telephone. You can do this by telephoning the caller's employer.
- Determine what information will be provided. Respond to the questions if they fall within your policy guidelines. If the inquiry goes outside the information your company decided to provide, inform the person that your company policy prohibits sharing that information.
- Determine if you will allow oral references or if you will require all references to be in writing. Create a form marked "confidential" for written references. The form can be sent or faxed to anyone requesting information. When returning the form to the employer who requested the reference, mark the envelope confidential. Returning the form by fax compromises the privacy of the information.
- State that references will be provided only to those with a need to know the information, such as a prospective employer's personnel manager.
- Provide only truthful job-related information rather than personal data. It may be helpful to create a form for terminating employees that shows the type of information commonly requested in reference checks, such as dates of employment, positions held, rates of pay and eligibility for rehire. This will help ensure that the information provided was truthful, relevant and based on proper documentation.
- Document each request for a reference, including the name, title and telephone number of the person requesting the information and the information provided.

Authorization to Release Personnel Records

Compelled Self-Publication

You can be held liable for defamation of character without having distributed a single piece of information on a former employee. Liability has been found under the claim "defamation by compelled self-publication." This occurs when a job seeker is compelled to tell a prospective employer about negative information, allegedly untrue, in the former employer's personnel file. The theory runs that if the job seeker does not tell the prospective employer about the negative information, the prospective employer will discover it upon calling the former employer and presume that the job seeker was trying to hide something. According to the theory, the job seeker has no choice but to defame himself to avoid this negative presumption.

The California case *Davis v. Consolidated Freightways, Inc.* provides guidance in protecting yourself against this type of claim.[150] In this case, the appeals court refused to hold the employer liable for the former employee's alleged compelled defamatory self-publication. The company had a strict policy against giving out any information to prospective employers about former employees except their dates of employment. Because of this strict policy, the court held the former employee was not compelled to self-publish the reason for his discharge because the company would not have given out this information in any case.

As this decision shows, you should maintain a strict policy on providing references. This policy should be made known to employees, via a handbook or company memo, so employees will not have a reasonable belief that they are compelled to self-publish defamatory information.

Statements to a Police Department

In *Bardin v. Lockheed Aeronautical Sys. Co.*, an employer provided information to the Los Angeles Police Department (LAPD) about a former employee who was applying for a job as a police officer. The employer included information on a complaint filed against the employee regarding drinking on the job. The employee claimed the statements made by her former employer were false and misleading negative information and sued for defamation of character. A California Court of Appeal held that the employer did not defame the former employee because its statements to the LAPD were privileged under California Civil Code section 47(b), which protects communications to a police agency engaged in a background investigation.[151]

Retaining Records

Employers are often confused about which records to keep, how long to keep them and where to store them. For information on access to employee records, see "Access to Personnel Files" on page 142.

How Long to Retain Records

At least seven laws, both state and federal, mandate different lengths of time various employment records must be kept. See the *Records Retention Requirements* chart, which shows which records these laws cover and the length of time records must be kept under each law.

For practicality's sake, many employers keep the bulk of an employee's personnel file and other records for the *duration of employment plus four years.* This time period covers nearly every law, with the exception of three types of records that must be removed from a file before it is disposed of and retained for a longer duration:

- Pension and welfare plan information (six years)[152]
- First aid records of job injuries causing loss of work time (five years)[153]
- Safety and toxic or chemical exposure records, including safety data sheets (30 years)[154]

Review the Records Retention Requirements chart to determine how long government agencies and various laws require specific personnel records to be kept on file.

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[150] *Davis v. Consolidated Freightways, Inc.*, 29 Cal. App. 4th 354 (1994)

[151] *Bardin v. Lockheed Aeronautical Sys. Co.*, 70 Cal. App. 4th 494 (1999)

[152] 29 CFR sec. 516.1 et seq.

[153] 8 CCR sec. 14300.7

[154] 8 CCR sec. 3204

Electronic Records Retention

In an age when more and more records are stored on hard disks, network servers and back-up locations, pay careful attention to retention policies and practices to be sure they include retention of records stored in this form.

Consider separating the electronic storage of business records from records that have mandated retention periods. Electronic records that contain confidential data and privileged communications often must be retained for extended periods of time. Other records, such as email messages and other routine communications, can often be destroyed after a reasonable time.

Policies and schedules that describe how to destroy items after the legal retention periods should include electronic as well as paper records. Establish, communicate and enforce retention procedures throughout your company. The retention requirements should include the records from computers of telecommuters who use company or personal computers for company business.

Avoid the appearance of selective records destruction if your company must defend a claim or lawsuit. If a lawsuit occurs, be prepared to preserve relevant electronic files and to produce these files as required.

Where to Retain Records

Keep employment records in individual personnel files. Access to these files should be restricted. Because personnel files often contain sensitive and private information, keep them in a locked cabinet with access controlled by a single individual or department from whom authorization must be gained before others can view the files. The *Personnel File Checklist* describes the records to keep in a personnel file.

Personnel File Checklist

Though you can keep the majority of the documents together in a personnel file, certain types of documents must or should be kept separately.

This section discusses the documents that must or should be kept separately.

Where to Retain Medical Records

California law mandates that you establish appropriate procedures to ensure all employee medical records and information will remain confidential and will be protected from unauthorized use and disclosure.[155] Failing to establish these procedures is a misdemeanor and allows an employee to collect damages and attorneys' fees.[156] For more information, see "Keeping Medical Information Private" on page 133.

Where to Retain Equal Employment Opportunity Information

If you are required by law to prepare an EEO1-Report, you may be gathering data regarding the racial or ethnic identity of an individual in the course of completing the report. The EEOC recommends maintaining a permanent record as to the racial or ethnic identity of an individual for the purpose of completing the report form only if the employer keeps such records separately from the employee's basic personnel file or other personnel records available to those responsible for personnel decisions, e.g., as part of an automatic data processing system in the payroll department.[157] For more information, see "Discrimination Reporting Requirements" in Chapter 26, page 771.

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[155] Civ. Code sec. 56.20

[156] Civ. Code secs. 56.35, 56.36

Where to Retain Employment Eligibility Verifications (Form I-9)

Keep forms and information verifying your employees' right to work in this country, including the *Form I-9 - Employment Eligibility Verification* and photocopies of verification documents, in a common file rather than in each employee's personnel file. This ensures that you can access the information easily for an audit by immigration or labor officials. It also allows you to readily review all the forms on a regular basis to determine if it is necessary to reverify expiring documents.

Disposing of Records

You must dispose of some employment documents that contain personal information by shredding or burning them. The Fair and Accurate Credit Transactions Act (FACTA), passed in 2003, imposed this requirement, effective in 2005, on all employers, regardless of size. The purpose is to protect current, past and prospective employees' personal information such as Social Security numbers, addresses, telephone numbers and any other information reported to an employer by a third party consumer reporting agency.

If you use an outside party to dispose of records, you must conduct due diligence in hiring a document destruction contractor. Due diligence could include:

- Reviewing an independent audit of a disposal company's operations and/or its compliance with this rule
- Obtaining information on the disposal company from several references
- Requiring that the disposal company be certified by a recognized trade association
- Reviewing and evaluating the disposal company's information security policies or procedures

If the information is stored on computer disks or other recordable media, it must be destroyed before discarding the media. If the data is stored on the hard drive of a computer that is being sold or donated to another party, the data must be removed in a way that makes it unrecoverable.

You must restrict access to personal information while it's being stored. Failure to comply with the regulations could result in federal or state fines or civil liability in individual or class action lawsuits.

Protecting Employer Information

You must often give certain employees access to confidential information so they can do their jobs. Concern naturally arises as to what the employee can do with that confidential information, particularly after the termination of employment. An ex-employee could use confidential client lists, trade secrets, formulas or techniques to compete with his/her former employer, making the ex-employee a formidable business competitor.

Noncompetition Agreements Generally Prohibited

California Business and Professions Code section 16600 provides that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Therefore, section 16600 invalidates provisions in employment contracts or noncompetition agreements that prohibit an employee from working for a competitor after completion of his/her employment or imposing a penalty for doing so, unless they are necessary to protect your trade secrets.[158] Noncompetition agreements are strictly construed against you and in favor of the employee.[159] This body of law was developed to ensure that employees would not be prevented from earning a livelihood if they chose to leave a particular job.

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[157] 29 C.F.R. 16021.13

Courts Rule Against Noncompetition Agreements

The California Supreme Court has repeatedly confirmed that noncompetition agreements are unenforceable in California. Agreements that restrict an employee's ability to pursue similar employment after leaving a job are prohibited, even if they are narrowly written and leave a substantial portion of the available employment market open to the employee. Unless a noncompetition agreement clearly falls under one of the following exceptions, it will be unenforceable in California:

- Trade secrets protections, which can legally restrict an employee's ability to use confidential information or company-defined trade secrets
- Sale of a business, which can legally restrict a seller's ability to compete with the buyer in the geographic location where the seller had carried on his/her business
- Dissolution of a partnership, which can legally define a geographic area within which one of the partners cannot conduct a similar business

California courts consistently find that noncompetition agreements go against public policy because they restrict an individual's ability to earn a living. Requiring a former employee to obtain a release of an invalid agreement constitutes unlawful interference with the employee's rights. In addition, a waiver of "any and all" claims is not an illegal waiver of employee indemnification rights unless the waiver specifies that indemnification is being waived.[160]

In *Dowell v. Biosense Webster, Inc.*, a California court held that the trade secret protection permitted under law does not automatically exist as an exception to noncompetition agreements.[161]

The Court of Appeals held that a broadly worded noncompetition and nonsolicitation agreement did not protect trade secrets. The court also expressed doubt as to the existence of a common-law trade secret exception to noncompetition agreements. Employers who want to protect trade secrets should consult with legal counsel for assistance in drafting agreements.

In addition, "no-rehire" clauses in separation agreements or settlements with an employee may constitute an unfair restraint on a person's ability to earn a living.

In these agreements, companies often include language stating that the employee is not eligible for rehire with the company. These "no-rehire" clauses often prevent the employee from working at the specific job site where he/she worked before, and also at any other company location, subsidiary or affiliate.

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In one case, the Ninth Circuit Court of Appeal called the legality of such no-rehire provisions into question, holding that Business and Professions Code section 16600 is not limited to just non-compete agreements and that it applies to every contract that restrains a person from engaging in his/her profession.[162]

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[158] *Muggill v. Rueben H. Donnelly Corp.*, 62 Cal. 2d 239 (1965)

[159] *KGB, Inc. v. Giannoulas*, 104 Cal. App. 3d 844 (1980); *Campbell v. Board of Trustees*, 817 F.2d 499 (9th Cir. 1987)

[160] *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008)

[161] *Dowell v. Biosense Webster, Inc.*, 179 Cal. App. 4th 564 (2009)

[162] *Golden v. California Emergency Physicians Medical Group*, 2015 782 F.3d 1083 (9th Cir. 2015)

The case involved a settlement agreement that prevented a doctor from working at any facilities that his former company managed or staffed. The court sent the case back to the lower court to determine if the no-rehire clause was a substantial restraint on the doctor's medical practice.

Trade Secrets

Whether you can prohibit an employee from using information gained from you in future employment is essentially dependent on if that information can be classified as a trade secret, a term that is somewhat misleading. The term "trade secret" implies a highly protected, extremely secretive method of production and conjures up images of "Secret Formula X" in a guarded vault. In fact, the definition is much more broad in relation to the area of employer confidentiality.

A trade secret is information, including a formula, pattern, program, customer list, device, technique or process that:

- Derives actual or potential independent economic value from not being generally known to the public or to people who can obtain economic value from its disclosure or use
- Is the subject of reasonable efforts under the circumstances to maintain its secrecy[163]

A showing of value, by itself, is not sufficient to satisfy the statutory definition of a trade secret. Other businesses must be unaware of the information and must be able to put that information, if it were known to them, to beneficial use.[164]

To be considered a trade secret, information must be:

- Closely guarded
- An investment of considerable amount of time and expense by the employer
- Not readily available to the public[165]

Some examples of trade secrets include:

- Customer lists that you compiled with a significant investment of time and/or money. Such a list would be a trade secret if you refined a general customer list by noting particular product or other preferences of each customer.
- A particular method or sequence of manufacturing a product
- A closely guarded product formula (the Coca-Cola® formula is a classic example)
- The identity of a source of raw material not generally known in the industry
- Compensation and other financial data
- Marketing strategies
- Labor relations strategies
- Research into new materials, processes, etc.
- Pending projects

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[163] Civ. Code secs. 3426-3426.10

[164] *Abba Rubber Co. v. Sequist*, 235 Cal. App. 3d 1 (1991)

[165] *State Farm Mutual Automobile Ins. Co. v. Dempster*, 174 Cal. App. 2d 418 (1959)

Inevitable Disclosure

In many states, employers can block employees from going to work for a competitor under the doctrine of "inevitable disclosure." The theory behind this rule is that if an employee is exposed to trade secrets in one job, he/she will inevitably disclose those secrets to a new employer.

In cases such as *Whyte v. Schlage Lock Co.*, California courts have made it clear that the inevitable disclosure doctrine does not apply in California.[166] Therefore, in California a former employee cannot be prevented from employment with one of the company's competitors because the former employee might inevitably disclose trade secrets of the first employer.

General Knowledge or Skills Not Protected

A person has a substantial interest in the unrestrained pursuit of his/her livelihood and generally is allowed to change employers and compete with former employers.[167] If an employee does not use any of the former employer's trade secrets,[168] he/she can use the general knowledge, skill and experience acquired from prior employment and even solicit some of the same clients to better succeed when working for later employers.[169]

Confidentiality Policies

An employee handbook that includes a broad confidentiality policy or restricts reasonable employee speech violates both state and federal law. California law prohibits employers from publishing or enforcing policies that limit the employee's right to discuss wages and working conditions.[170]

The National Labor Relations Board (NLRB) rejected a policy that included "violating a confidence or unauthorized release of confidential information" among behaviors that could result in disciplinary action. The NLRB ruled that the handbook content violated federal labor law because employees could reasonably understand it to restrict discussion of wages and other terms and conditions of employment with fellow employees and with the union.[171]

This follows an earlier NLRB decision rejecting rules prohibiting employees from complaining to customers about the terms and conditions of their employment while wearing the company's uniform.[172]

The NLRB has also issued guidance relating to overly broad confidentiality policies. The NLRB may interpret such policies as violating employees' rights under Section 7 of the National Labor Relations Act to discuss the terms and conditions of employment. Section 7 rights apply to all employees in both union and non-union workplaces. For more information, see "Overly Broad Confidentiality Provisions" on page 957.

A sample confidentiality policy is available as part of CalChamber's ***Employee Handbook Creator***. Visit our online store at store.calchamber.com to find out more about how to quickly and easily create your employee handbook.

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[166] *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443 (2002)
[167] *KGB, Inc. v. Giannoulas*, 104 Cal. App. 3d 844 (1980)
[168] *Matull & Associates v. Cloutier*, 194 Cal. App. 3d 1049 (1987)
[169] *American Alloy Steel Corp. v. Ross*, 149 Cal. App. 2d. 215 (1957)
[170] Lab. Code secs. 232, 232.5, 1197.5
[171] *Cints Corp.*, 344 NLRB No. 118 (June 30, 2005)
[172] *Guardsmark, LLC*, 344 NLRB No. 97 (June 7, 2005)

Soliciting Customers

An employee can notify customers that he/she is severing his/her business relationship with you and engaging in business for himself/herself, even before the employee resigns.[173] However, an employee, during employment, owes you a duty of diligent and faithful service, and thus cannot solicit customers before leaving employment.[174] With the exception of solicitation using a former employer's trade secrets, an employee generally is free to solicit customers of his/her former employer after he/she resigns.[175]

Unfair Competition

Unfair competition is a generalized term for business conduct that is contrary to honest practice in industrial or commercial matters.[176] Misappropriation of trade secrets is one form of unfair competition,[177] but the term encompasses a broader range of misconduct about confidential business information. Ultimately, the term "unfair competition" has no fixed meaning, but depends instead on the facts of each case.[178]

The case law suggests several limited instances in which relief can be granted against a former employee now in competition with you:

- When an employee forms a competing business before resigning his/her employment[179]
- In certain circumstances relating to soliciting customers
- By disparaging your products or services, secretly diverting business to a competitor or soliciting only your preferred or most profitable customers[180]

Employee Inventions

If you have employees who conduct research and who may invent products or devices in the course of that research, establish an agreement with those employees from the beginning of employment.

However, if you require or offer an employee to assign his/her invention rights to you, know that these rights do not apply to an invention if:

- The invention is developed entirely on the employee's own time
- The equipment, supplies and facilities belong to the employee
- The employee did not use any of your trade secrets
- The invention does not relate to your business or to your actual research or development
- The invention does not result from any work performed by the employee for you

You cannot enforce any agreement that purports to apply to these inventions.[181]

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[173] *Aetna Building Maintenance Co. v. West*, 39 Cal. 2d 198 (1952)

[174] Civ. Code sec. 2322; Lab. Code sec. 2859

[175] *Continental Car-Na-Var Corp. v. Mosely*, 24 Cal. 2d 104 (1944)

[176] *American Heritage Life Insurance Co. v. Heritage Life Insurance Co.*, 494 F.2d 3 (5th Cir. 1974)

[177] *Klamath-Orleans Lumber, Inc. v. Miller*, 87 Cal. App. 3d 458 (1978)

[178] *Grant v. California Bench Co.*, 76 Cal. App. 2d 706 (1946)

[179] *Bancroft-Whitney Co. v. Glen*, 64 Cal. 2d 327 (1966)

[180] *Scavengers Protective Association v. Serv U Garbage Co.*, 218 Cal. 568 (1933)

[181] Lab. Code sec. 2870

An employment agreement in which the employee agrees to assign his/her rights and interests in inventions to you can simplify problems that can arise with employee inventions if that agreement is consistent with the above. The employment agreement can require the employee to assign or offer to assign the employee's rights to an invention if, at the time the invention is conceived or put into practice, it relates to your business or to your actual or demonstrably anticipated research.

Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule

The Health Insurance Portability and Accountability Act (HIPAA) privacy rule relates to the protection of medical records. The rule was created to provide greater protection against involuntary disclosure of an individual's medical information, particularly as that information is stored and exchanged electronically among health care providers, insurance companies and employers. Most of the burdens imposed by these rules fall on organizations known as "covered entities," typically a health care provider, health insurance plan, third-party administrator (TPA) or health care clearinghouse that collects and maintains health care records. Generally, you have few obligations under the privacy rules, unless you also fall into one of the categories of "covered entities" described in this section.

This section is not intended to be an exhaustive description of the HIPAA privacy rules, but rather to alert you to:

- The possibility that you might be a "covered entity" and the obligations that status entails
- Other impacts of HIPAA privacy rules on your status as an employer

HIPAA's privacy and security rules are enforced by the U.S. Department of Health and Human Services' Office of Civil Rights, which also provides information on HIPAA compliance.

Organizations Covered by HIPAA

An employer may be a covered entity if its health plan is self-insured or if it administers health benefits internally. Also, employers that run on-site health clinics for their employees are referred to as "hybrid entities." The HIPAA privacy rule covers the part of their operations involved in health care.

A "covered health plan" is a group health plan, defined as an employee welfare benefit plan under the Employee Retirement Income Security Act (ERISA) of 1974. Covered health plans include both insured and self-insured plans, hospital and medical benefits plans, dental plans, vision plans, health flexible spending accounts (FSAs) and employee assistance plans.

An exception exists for self-administered plans with less than 50 participants. However, small plans that are administered by a TPA are covered by HIPAA.

A health FSA is considered a covered plan and, where self-funded, must comply with HIPAA privacy requirements.

Information Protected by HIPAA

Information covered by the HIPAA privacy rule is referred to as "protected health information" (PHI). PHI is "individually identifiable health information" transmitted or maintained in any form or medium. This information includes a long list of health and personal information that either identifies or can be used to identify an individual and his/her related medical data.

"Individually identifiable health information" is information, including demographic data, that relates to:

- The individual's past, present or future physical or mental health or condition
- The provision of health care to the individual
- The past, present, or future payment for the provision of health care to the individual

Covered information either identifies the individual or a reasonable basis exists to believe that the information can be used to identify the individual. Individually identifiable health information includes many common identifiers (e.g., name, address, birth date or Social Security number).

Under HIPAA, a covered entity generally is restricted from using or disclosing PHI. In addition, HIPAA grants certain rights to individuals, such as the right to access, amend and receive an accounting of disclosures of their protected health information. HIPAA also imposes certain administrative responsibilities on covered entities.

Covered entities must ensure that employees use and disclose PHI only as permitted under the HIPAA privacy rule.

Covered entities also need to comply with the HIPAA Security Rule to reduce the risk of security breaches. The Security Rule provides physical, technical and administrative safeguards to deal with the risk. When a security breach occurs, plan participants need to be notified.

The HIPAA/Health Information Technology for Economic and Clinical Health (HITECH) Act Omnibus Final Rule went into effect in 2013 with most changes becoming mandatory September 23, 2013. The Final Rule made significant changes to the security breach notification standard and also revisions to the HIPAA enforcement rule.

Employers who are covered by the HIPAA rule are advised to consult with legal counsel to implement or update policies and procedures to ensure compliance with the revised HIPAA Security Regulations.

Employees who deal with PHI should also be trained regarding the revised HIPAA regulations. The Department of Health and Human Services emphasizes the importance of ensuring that employees who deal with PHI "are appropriately trained and knowledgeable about what constitutes a breach and on the policies and procedures for reporting, analyzing and documenting a possible breach of unsecured protected health." This section is not intended to provide detailed information on handling PHI. For more information, visit the Department of Health and Human Services' Health Information Privacy page (http://www.hhs.gov/ocr/privacy/index.html).

Disclosure of "Protected Health Information" by a Health Plan

Generally, PHI can be used or disclosed by a health plan *only* as follows:

- To the individual
- For treatment, payment, or health care operations
- To family members or close personal friends if the disclosure relates to the individual's health care or payment of health care, and, in most situations, if the individual has been given the advance opportunity to agree or object to the disclosure
- With the individual's written authorization
- For public policy or legal reasons

Self-Insured Health Plans and HIPAA

If your health plan is self-insured or if an employee administers your health plan, you are covered by HIPAA. Employers that self-insure or administer their group health plan bear further compliance obligations to safeguard PHI, including:

- Creating and distributing a Notice of Privacy Practices and rules that prohibit intimidation or retaliation against persons asserting their protected rights and that forbid employers from demanding waiver of rights to receive coverage or treatment
- Establishing and maintaining, for at least six years, policies and procedures to safeguard PHI
- Designating a privacy officer and contact people
- Training employees about privacy practices
- Establishing technical and physical PHI safeguards

HIPAA does allow a health plan to release "summary health information" to the plan sponsor.

As a plan sponsor, you cannot access a participant's medical data from the health plan except:

- As authorized by the participant
- As necessary for health plan administration
- In summary form for the purpose of evaluating plan design

HIPAA requires you to have procedures that prevent the information from being used for employment-related functions or functions related to other employee benefit plans or other benefits provided by the plan sponsor. As the plan sponsor, you must use and disclose protected health information received from the health plan only for plan administrative functions, which must be specified in the plan documents.

You must perform all of the following actions:

- Amend plan documents to describe the permitted uses of the protected health information.
- Document limitations on the use of the information in plan documents.
- Provide adequate firewalls between employees with access to the information and other employees and train employees on the HIPAA privacy obligations.

Insured Health Plans and HIPAA

The insured group health plan that receives PHI is subject to the basic requirements discussed above. But the insured group health plan can avoid some of the "infrastructure" requirements if it creates or receives only summary health information or enrollment information. The insured plan is still subject to the "no intimidation," "no waiver" and "documentation" requirements. The health insurer is responsible for providing the Notice of Privacy Practices and creating necessary policies and procedures about PHI storage and disclosure.

If a fully-insured group health plan receives PHI beyond summary health information or enrollment information, it is subject to all the requirements discussed above.

Verify that *all* of your group health plans are fully insured, including FSAs, which are considered group health plans and usually self-funded. Determine if the health information that the group health plan currently receives will subject the plan to the requirements of a self-insured plan. If it will, consider if the group health plan can avoid the requirements by receiving only summary health information and enrollment information. If this is not practical, work with your insurer and legal counsel to determine the best manner to comply with the HIPAA privacy rules.

Small Employers' Basic HIPAA Compliance Issues

For many small employers, compliance obligations are minimal. Health information obtained in connection with general employment matters, as opposed to that obtained in connection with your role as a health plan sponsor, is not covered by HIPAA. This includes:

- Requests for sick leave
- Family and Medical Leave Act requests
- Workers' compensation claims
- Disability claims
- Life insurance issues

Other privacy laws require that you protect the privacy of this health information by segregating it from other human resources files and limiting access to a need-to-know basis. For more information, see "Keeping Medical Information Private" on page 133.

A fully insured group health plan under which no one at the company can gain access to employee health information is partially exempt from HIPAA rules under the "administrative exception." A company can lose the administrative exception for fully insured plans when company personnel assist employees in filing or contesting claims.

FSAs and similar plans are self-insured and the administrative exception does not apply. This is true even if an outside party performs the plan's administrative functions.

Group health plans governed by the federal ERISA law are totally exempt if they have fewer than 50 eligible employees and are self-administered. Group health plans lose the exemption if administration is outsourced to a TPA.

Health Care Providers and HIPAA

Any physical examination or testing performed by a physician, clinic or lab that collects individually identifiable health information as part of a job offer creates PHI. Because the use is not for treatment, payment or health care operations, you or your health care provider must obtain a HIPAA-compliant authorization before the physician can release the information to you. You can use the information only for the purposes explicitly stated in the authorization provided to the physician; that is, to confirm employability for the job that was offered.

HIPAA affects the release of drug and alcohol test results for job applicants and employees and reports from Employee Assistance Programs (EAP) and substance abuse rehabilitation programs to which employees may be referred under company substance abuse policies.

If you maintain an on-site medical clinic, you are a "hybrid entity" and must comply with HIPAA privacy rules.

Other Employer HIPAA Issues

Though most employers are not covered entities, many are plan sponsors subject to the obligations of a plan sponsor and/or plan administrator under HIPAA or ERISA. Plan sponsors likely have an obligation to ensure their plans comply with HIPAA. This creates a twofold role for employers. First, you must ensure that any covered plans comply with the applicable HIPAA requirements. Verify that any of your TPAs or insurance carriers comply with HIPAA requirements.

An employer that wants or needs access to its plan's PHI must comply with the plan sponsor requirements.

The HIPAA rules include special exemptions for medical information relating to workers' compensation cases, allowing disclosure of only information as is authorized by, and necessary to comply with, relevant law.

The rules have limited impact on compliance with family leave, pregnancy leave, sick leave and disability laws. In these situations, the medical information is voluntarily provided by the employee or by the treating physician with the employee's authorization.

ADA and HIPAA

Many employers seek medical information from health care professionals to determine how to accommodate an individual's disability or to determine if an individual can perform a job function. When held by the employer, the medical information is not PHI and is not regulated by HIPAA. However, medical information generally is PHI and regulated by HIPAA when held by a health care professional. HIPAA often prevents health care professionals from disclosing PHI to you unless you or the health care professional obtains the individual's authorization to disclose the PHI. Review forms and ensure that they contain an authorization compliant with HIPAA and any applicable state law.

Generally, you are covered by the ADA's confidentiality rules even if you are not covered by the HIPAA Privacy Rule. The ADA confidentiality rules, like the HIPAA privacy rule, restrict how ADA-related medical information can be used or disclosed.

Family and Medical Leave Act (FMLA) and HIPAA

Employers often receive medical certification forms under the Family and Medical Leave Act (FMLA). These forms are completed by a health care provider and verify the existence of a "serious health condition" under the FMLA. These forms often contain medical information.

You are not covered by HIPAA because a completed FMLA form contains medical information. However, the health care professional completing the form generally cannot disclose the PHI to you without the employee's authorization. HR professionals should review FMLA forms and ensure that they contain an authorization compliant with HIPAA and any applicable state law.

Workers' Compensation Laws and HIPAA

The HIPAA Privacy Rule contains special rules relating to workers' compensation laws. These special rules allow a covered entity, such as a health care provider, to disclose PHI if necessary to "comply with" workers' compensation laws. You may be required by the health care professional to verify that the PHI is necessary to comply with workers' compensation laws. As an alternative, you can obtain an authorization from the individual allowing the health care professional to disclose PHI to you.

Drug Testing and HIPAA

You can use a medical laboratory or clinic to assist with drug or other substance abuse testing. Like the disclosures discussed above, you should obtain an individual's authorization to allow the laboratory or clinic to disclose PHI to you. A medical laboratory or clinic can also disclose PHI to you if applicable state or federal law requires a disclosure.

Workplace Injuries and HIPAA

A health care provider who is your employee, such as an employee of an on-site clinic, or who provides services at your request can disclose limited PHI to you related to workplace injuries or medical surveillance at the workplace if the disclosure is required by OSHA or similar state law. If the medical care is rendered at the workplace, you must post a conspicuous notice addressing the disclosure or provide the notice to the individual at the time the health care is administered.

Litigation Matters and HIPAA

The HIPAA privacy rule draws a sharp distinction between the employer and the employer's group health plan. The group health plan generally cannot disclose PHI to the employer. You may need to establish a "firewall" and clearly state which HR professionals are "employer representatives" and which are "health plan representatives."

Examine whether a health plan representative discloses PHI to an employer representative. This is especially true in employment litigation, where this sharp distinction could raise difficulties for employers. For example, suppose an individual claims that he/she is disabled. The health plan representative may have information demonstrating that the individual is not disabled. The health plan representative cannot share this information with your representative because that sharing would be a prohibited disclosure of PHI to the plan sponsor. You may have difficulty defending certain employment litigation matters because the health plan representative cannot disclose relevant medical information to the employer representative. Consult with counsel on this issue, as necessary information may be available if properly subpoenaed.

Further Information

For questions about consumer reporting agencies or creditors, contact:

Federal Trade Commission
Consumer Response Center, Room 130-A
600 Pennsylvania Ave. NW
Washington, D.C. 20580
(202) 326-2222

For more information on the FCRA, written specifically for employers by the FTC, visit the FTC website at http://business.ftc.gov/documents/bus08-using-consumer-reports-what-employers-need-know.

For more information on the HIPAA Privacy Rule, visit the U.S. Department of Health & Human Services website at www.hhs.gov/ocr/privacy/index.html. For more information on the Notice of Privacy Practices required by the HIPAA Privacy rule, visit www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/notice.html.

Chapter 9

Drugs, Alcohol and Smoking in the Workplace

Eliminating substance abuse in the workplace is good for business. It reduces health insurance costs, improves employee productivity and reduces the likelihood of accidents, which adversely affect workers' compensation costs. California has gone so far as to eliminate smoking from the workplace.

This chapter familiarizes you with the federal and California Drug-Free Workplace Acts, local ordinances and federal Department of Transportation (DOT) testing regulations. This chapter also provides detailed discussion about testing, privacy issues, disability discrimination, drug use, rehabilitation, smoking in the workplace and policy creation for your workplace.

Federal Drug-Free Workplace Act of 1988

Any organization that enters into a federal contract for the procurement of property or services valued at $100,000 or more or receives any federal grant must follow the regulations of the Drug-Free Workplace Act of 1988.[1] The act requires you to certify to the federal agency issuing the contract that you will provide a drug-free workplace. This certification requires you to create a plan that provides for a drug-free workplace and to file that plan with the federal government.

To do business with the federal government, you must:

- Certify to the government agency with whom you are doing business that you maintain a drug-free workplace. The government does not approve or disapprove of employee drug testing, but false certification is grounds for suspending or terminating the contract. Serious lack of drug enforcement in the workplace could result in being barred from obtaining any further contracts with the federal government.
- Publish, circulate and provide each employee a statement notifying him or her that it is unlawful to manufacture, distribute, dispense, possess or use a controlled substance in your workplace. The statement must specify the penalties for each violation.
- Establish a drug-free awareness program to inform your employees about:
  - The dangers of drug abuse in the workplace
  - Your policy of maintaining a drug-free workplace
  - The availability of any drug counseling, rehabilitation or employee assistance programs (EAPs)
  - The penalties that can be imposed upon employees for drug abuse violations in the workplace
- Notify all employees in a written statement that, as a condition of employment, employees must:
  - Abide by the terms of the program
  - Notify you of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after a conviction
  - Notify the government contracting office within 10 days of receiving notice that a covered employee has been convicted of a criminal drug violation in the workplace

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[1] 41 U.S.C. 701 et. seq.

- Impose corrective measures on the employee convicted of drug abuse violations in the workplace within 30 calendar days of receiving notice of his/her conviction. Options include:
  - Taking action against the employee, up to and including termination; or
  - Requiring the employee to satisfactorily participate in a drug abuse assistance or rehabilitation program that is approved by federal, state or local health agencies; law enforcement or other appropriate agencies.
- Make an ongoing good faith effort to maintain a drug-free workplace

If you fail to follow the requirements of the Drug-Free Workplace Act, you may be subject to suspension of payments on a federal contract or grant, and even barred from receiving future contracts.

California's Drug-Free Workplace Act

California's Drug-Free Workplace Act of 1990 is almost identical to the federal act, but applies only to people or businesses contracting with or receiving grants from California state government.[2] Each of these businesses must certify that it does, or will, provide a drug-free workplace before doing business with the state.

The state requires you to:

- Write and publish a statement notifying all employees that it is unlawful to manufacture, distribute, dispense, possess or use a controlled substance and that these acts are prohibited in your workplace. The statement must specify the actions that will be taken against the employee for these violations of the policy.
- Establish a drug-free awareness program that informs all employees about:
  - The dangers of drug abuse in the workplace
  - Your policy of maintaining a drug-free workplace
  - The availability of drug counseling, rehabilitation and EAPs
  - The penalties that you can impose upon employees for drug abuse violations
- Give each employee engaged in the state contract a copy of your drug-free workforce statement, and require that, as a condition of employment on the state's contract or grant, the employee agrees to abide by the statement's terms.

The state also requires organizations that are awarded a state contract or grant to provide a drug-free workplace program. If they do not, the organization is subject to the suspension of payments or termination of the contract or grant.

The state can suspend or terminate the contract if you:

- Falsely state that you provide a drug-free workplace program
- Violate the certification by failing to carry out the requirements of its drug-free workplace program

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[2] Govt. Code sec. 8350

San Francisco Drug Testing Ordinance

The city of San Francisco enacted a local ordinance relating to drug testing. This ordinance places certain explicit limitations on an employer's ability to require drug testing.

San Francisco's drug testing ordinance limits testing of employees, but places no restrictions on testing of applicants.

The ordinance requires that all of the following conditions exist in order to test employees:

- Reasonable grounds to drug test
- A clear and present physical danger to the employee, another employee or members of the public
- The opportunity for the employee to retest the sample by another facility[3]

Check local ordinances in locations where you conduct business to make sure that there aren't any municipal regulations relating to drug testing.

Transportation Industry Drug and Alcohol Testing

Both state and federal laws impose strict requirements on employers and operators engaged in commercial transportation. Failure to comply can result in significant penalties to both employers and individual operators.

DOT Drug Testing Overview

In 1994, DOT issued drug and alcohol testing regulations covering about seven million employees in the transportation industry, pursuant to the Omnibus Transportation Employee Testing Act (OTETA).[4] The regulations, developed and administered by DOT, apply to employees under the Federal Highway Administration (FHWA), the Federal Railroad Administration (FRA), the Federal Transit Administration (FTA), the Federal Aviation Administration (FAA) and the Research and Special Programs Administration (RSPA).[5]

Specific regulations also apply to employees of the Federal Rules and Safety Administration.[6] Each type of transportation industry may have its own specific regulations. Get more information at www.dot.gov.

Prohibitions

The OTETA regulations prohibit:

- Being on duty while having an alcohol concentration of 0.04 or greater
- Possessing alcohol
- Using alcohol on duty
- Using alcohol before duty
- Using alcohol after an accident

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[3] San Francisco, CA Municipal Code Pt. II, Police Code, article 33A, sec. 3300A.1 et. seq (1985)

[4] Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143; 59 Fed Reg. 7301; 49 CFR Part 40

[5] 49 CFR Part 40

[6] 49 CFR Part 382

- Refusing to submit to a required alcohol or controlled substances test
- Reporting for or remaining on duty when using a controlled substance, except when used pursuant to a physician's instructions and when the physician advised a driver that the substance does not adversely affect the ability to operate a commercial motor vehicle
- Any driver who has tested positive for controlled substances from remaining on duty or performing safety-sensitive functions

Employer Requirements

The regulations allow you to require a driver to advise you of any therapeutic drug use.

The regulations also require you to:

- Maintain records related to:
  - The testing process
  - Test results
  - Substance abuse professional evaluations
  - Violations of the regulations
- Maintain calendar year summaries of results of alcohol and controlled substances testing programs using required management information system forms
- Provide information when a driver applies for a position with a new employer
- Obtain information on:
  - A prospective driver's alcohol tests with a 0.04 or greater concentration level
  - Refusals to be tested
  - Positive controlled substances test results
- Prohibit a driver from performing safety-sensitive functions for more than 14 days if the above information is not obtained
- Provide specific educational materials to drivers and obtain a signed certificate of receipt for the materials
- Provide at least two hours of alcohol and controlled substance training to supervisors

Consequences for Drivers

A driver who engages in conduct prohibited by the regulations must:

- Be removed from safety-sensitive functions
- Be referred to a substance abuse professional for evaluation, unless the driver is an applicant or the positive test is for alcohol at a concentration of 0.02 or greater but less than 0.04
- Obtain a negative result in a return-to-duty test
- Properly follow a rehabilitation program if recommended
- Be subject to unannounced follow-up testing following a return to duty

DOT revised transportation employee drug and alcohol testing regulations in 2001. Highlights of the revised rules include:

- A requirement that you obtain drug and alcohol test results from applicants' previous employers from the past two years
- Mandatory validity testing for all specimens
- Options for temporarily removing employees from safety-sensitive duties before final verification of a positive, adulterated or substituted laboratory test result
- Service agents, such as labs, technicians and medical review officers, who fail or refuse to comply with the rules may be temporarily barred from providing drug testing services to DOT-covered employers
- Enhanced training requirements for collectors, technicians, medical review officers and substance abuse professionals
- Changes in specimen collection procedures and laboratory processes
- Education and/or treatment for all applicants who have positive test results or refuse to test
- Greater use of electronic means to transmit and store data
- Specific requirements for releasing information to employees and third parties

DOT Testing Regulations

DOT's regulations require employers to use a Department of Transportation Alcohol Testing Form for DOT alcohol tests.[7] You can download this form at http://www.transportation.gov/odapc/documents.

All DOT-regulated employers must also ensure that they and their service agents use the federal Custody and Control Form for samples. You can download this form at http://www.transportation.gov/odapc/documents.

Triple Damages for Injury Due to Drug or Alcohol Use

Under state law, you may be liable for triple damages when one of your commercial vehicle drivers injures another person in the course of employment if both of the following conditions are met:

- The commercial vehicle's driver was under the influence of alcohol or a controlled substance at the time of the injury.
- At the time of the injury, you willfully failed to comply with DOT testing requirements.[8]

Employment Requirements for Commercial Drivers

California law requires that an applicant for employment as a commercial driver or as an owner-operator must have received negative test results for all required DOT testing before being placed on duty.[9] In addition, you must complete a full investigation of the driver's employment history as required by federal law. Whether making or receiving inquiries about a driver's history, you must document all steps you take to comply with this requirement.[10]

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[7] 49 CFR Part 40

[8] Civ. Code sec. 3333.7

[9] Vehicle Code sec. 34520(f)

[10] Vehicle Code sec. 34520(g)

Employment Screening Services

You can use an employment screening service to review applications if the screening services provided satisfy requirements of state and federal law. You must abide by any of the screening service's findings that disqualify an applicant from operating a commercial vehicle.[11]

Penalties for Violating DOT Testing Regulations

Violation of DOT testing laws is a misdemeanor under state law, punishable by six months in jail and/or a fine of up to $5,000.[12]

The California Highway Patrol (CHP) can suspend your motor carrier permit for up to one year for failure to comply with DOT testing regulations or failure to make copies of test results and other records available for inspection by the CHP.[13]

When Drug Testing May Be Permitted

Numerous states, including California, have passed drug testing laws. However, California is one of seven states whose constitutions also guarantee an individual's right to privacy.[14] This guarantee places additional restrictions on laws and regulations applying to alcohol and drug testing programs.

Although the courts have addressed the issue of drug testing, the right of private employers to test current employees for drugs and alcohol remains somewhat unsettled.

You may be permitted to conduct drug testing in five circumstances:

- During pre-employment screening
- As part of a physical examination
- Under reasonable suspicion
- During post-accident testing
- As a part of random testing. However, the legality of random drug tests, particularly in California, is extremely limited.

Applicants or employees who currently use illegal drugs or abuse alcohol are not protected under the state or federal laws protecting individuals with disabilities. Adopting and administering reasonable policies to prevent drug use, possession, or sale in the workplace does not violate the ADA or FEHA. For more information on the extent of any protections, including a discussion of medical marijuana use, see "Drugs and Alcohol" in Chapter 28, page 831.

The following discusses each of these circumstances and the legal restrictions placed upon each type of testing.

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[11] Vehicle Code sec. 34520(h)

[12] Vehicle Code sec. 34520(i)

[13] Vehicle Code sec. 34623(c)

[14] California Constitution, Article 1 sec. 1

Pre-Employment Screening

As a condition of hiring, most employers can require an applicant to successfully pass a pre-employment drug test.[15] Suspicionless drug testing as a condition of hiring is valid when applied to all job applicants.[16]

In *Loder v. City of Glendale*, the California Supreme Court addressed the issue of drug testing applicants and employees seeking promotions. In that case, applicants for employment as well as current employees seeking promotions were required to undergo urinalysis testing for drugs and alcohol. The court refused to allow the city to drug test current employees applying for promotions, but did allow testing of applicants.[17]

Suspicionless drug testing of applicants is valid even if the applicant delays submitting the test until after he/she starts work.[18]

Routine Testing in Annual or Periodic Physical Examinations

Although the issue is not yet determined in California, federal courts and some state courts have approved testing as part of annual or periodic physical examinations, particularly in union employment relationships governed by collective bargaining agreements.[19] However, under the ADA and FEHA, the physical examination must be either part of a voluntary employee health program or job-related and consistent with business necessity.

Employers may wish to seek advice of counsel prior to instituting such routine testing because California courts routinely protect privacy rights.

If you choose to use drug testing in physical examinations, notify employees that drug and alcohol tests will be administered as part of the physical examination. Advise employees that you may take disciplinary action if they refuse to consent to a test. You can take disciplinary action if the employee refuses the test outright. However, under the California Confidentiality of Medical Information Act, you cannot take disciplinary action if the employee refuses to release any purely medical information obtained from the test.[20] You can only ask a physician's opinion about whether the employee is able to satisfactorily perform his/her job duties.

Random Drug Testing

Random drug testing programs are those in which an employer informs employees that they may be required to submit to drug testing at any time during their employment for any reason or for no reason at all.

Although random drug testing may be the most effective program to detect and deter drug or alcohol use, the legality of random drug testing, particularly in California, is extremely limited.

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[15] *Wilkenson v. Times Mirror Corp.*, 215 Cal. App. 3d 1034 (1989)

[16] *Loder v. City of Glendale*, 14 Cal. 4th 846 (1997)

[17] *Loder v. City of Glendale*, 14 Cal. 4th 846 (1997)

[18] *Pilkington Barnes Hind v. Superior Court*, 66 Cal. App. 4th 28 (1998)

[19] See e.g., *International Brotherhood of Teamsters v. Department of Transportation*, 932 F.2d 1292 [illegible] *Division 1279 v. Cambria County Transit Authority*, 691 F. Supp. 898 (W. D. Pa. 1988)

[20] Civ. Code sec. 56.20(b)

Cases upholding random drug testing are limited to those involving employees in the following situations:

- Employees in specific, narrowly defined job classifications
- Employees in professions that can be categorized as part of a pervasively regulated industry, where the employee has less expectation of privacy given the nature of employment
- Employees in positions that are critical to public safety or the protection of life, property or national security

For example, random testing has been upheld for truck drivers under the FHWA regulations,[21] aviation personnel,[22] and correctional officers having contact with prisoners.[23]

Further, according to the American Professional Captain's Association, "a random test program is required for all licensed officers on vessels that require a license to operate. It also includes all crew members working on those boats requiring a licensed officer. Because the pre-employment test is given with notice, it does not replace the need for a random program. However, a random program, if already in place, can be used in lieu of an employment test."

With these exceptions, random drug testing is not allowed in California. In *Luck v. Southern Pacific Transportation Co.*, the court held that any intrusion into an individual's privacy must be justified by a compelling interest. The court found that the employer's concern about deterrence, efficiency, competency, a drug-free environment, rule enforcement and ensuring public confidence in the railway system were not compelling interests. Moreover, the court held that safety was not a compelling reason for testing the employee involved — a computer operator for a railroad who was not in a safety-sensitive position — and that her termination for refusing to consent to the test breached the covenant of good faith and fair dealing.[24]

In another California Supreme Court case, *Hill v. NCAA*, the court considered the privacy rights of college athletes being randomly tested for drugs by an intercollegiate athletic association. In a statement that sheds some light on the right of private employers to randomly drug test, the court stated:

> We intimate no views about the legality of blanket or random drug testing conducted by employers, whether of current employees or applicants for employment, or by other kinds of entities. Employment settings are diverse, complex, and very different from intercollegiate athletic competition. Reasonable expectations of privacy in those settings are generally not diminished by the emphasis on bodily conditions, physical training, and extracurricular competition inherent in athletics.[25]

Based on this case, it is extremely risky to randomly test employees for drug use except in the unique circumstance in which an employee's expectation of privacy might reasonably be diminished. You must now show that the invasion of privacy is justified because it substantially furthers one or more legitimate and important interests outweighing the employee's privacy interest.

However, in California, random drug testing for security or safety positions may be allowed if the employee's privacy interests are outweighed by the employer's safety interests, including the employer's interest in reducing risk of injury to co-workers. In *Smith v. Fresno Irrigation District*, the court found that a construction and maintenance worker's duties were safety-sensitive because he operated power tools and heavy equipment in close proximity to co-workers and as part of a team performing dangerous work.[26] Advanced notice of the drug test will also decrease the expectation of privacy.

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[21] *International Brotherhood of Teamsters v. Department of Transportation*, 932 F.2d 1292 (9th Cir. 1991)

[22] *Bluestein v. Skinner*, 908 F.2d 454 (9th Cir. 1990)

[23] *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989); *American Federation of Government Employees, AFL CIO v. Roberts*, 9 F.3d 1464 (1993)

[24] *Luck v. Southern Pacific Transportation Co.*, 218 Cal. App. 3d 1 (1990), cert. denied, 111 S.Ct. 344 (1990)

[25] *Hill v. NCAA*, 7 Cal. 4th 1 (1994)

Reasonable Suspicion Testing

Courts are generally supportive of requiring drug or alcohol testing based on specific objective facts indicating abuse — often called "reasonable suspicion."

"Reasonable suspicion" has been defined by one court as something less than probable cause but more than mere suspicion. Reasonable suspicion requires further investigation and is based on facts and observations. [27] Specific objective facts and rational inferences drawn from those facts must justify reasonable suspicion. Evidence sufficient to justify reasonable suspicion need not rise to the level of full probable cause. Evidence can include alcohol on the breath, lapses in performance, inability to appropriately respond to questions and physical symptoms of alcohol or drug influence.[28]

The constitutionality of a drug test under the California Constitution is evaluated by balancing the employee's reasonable expectation of privacy against the employer's legitimate interests in imposing the test. If a drug test is not triggered by a reasonable belief that the employee is under the influence of drugs or alcohol, the employee can have a stronger reason to expect to maintain his/her privacy and you may have less of a need to demand the test.

In *Fraslawsky v. Upper Deck, Inc.*, an employer lost its motion for summary judgment after the employee, a former secretary, demonstrated that there was a factual dispute over whether her employer had reason to believe she was impaired, and that the supervisors who requested the test bore her some personal animosity that could have affected the decision. Nonetheless, the court found the existence of reasonable cause was relevant to determining the constitutionality of defendant's drug test demand. Without requiring an employer to exhibit reasonable cause for imposing the test, an employer with a valid drug testing policy would have free license to conduct random testing at any time.

The employee's declarations that she never used drugs, that she did not appear intoxicated and the suggestion that the employer wanted to fire the employee created a factual issue as whether the employer had reasonable cause to give plaintiff a drug test. The employee did not consent to a random drug test, and plaintiff's submission to an employment drug test did not eliminate her reasonable expectations of privacy in relation to a random drug test.[29]

Post-Accident Drug Testing

Courts have generally upheld post-accident drug testing where an employer has reasonable suspicion that an employee involved in the accident was under the influence of drugs and/or alcohol or if the accident was a serious one.[30] Consistent with that concept, the U.S. Supreme Court upheld the Federal Railroad Association's post-accident drug testing regulations even though the regulations did not require individual suspicion of drug use. [31]

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26. *Smith v. Fresno Irrigation District*, 72 Cal. App. 4th 147 (1999)
27. *City of Palm Bay v. Bauman*, 475 So. 2d 1322 (Fla. Dist. Ct. of App. 1985)
28. *Assoc. of Western Pulp and Paperworkers v. Boise Cascade Corp.*, 644 F. Supp. 183 (D. Or. 1986)
29. *Fraslawsky v. Upper Deck, Inc.*, 56 Cal. App. 4th 179 (1997)
30. *International Brotherhood of Teamsters v. Department of Transportation*, 932 F.2d 1292 (9th Cir. 1991)
31. *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989)

Denying Benefits Due to Drug Testing

In *Ables v. Shultz Steel Co.*, the California Unemployment Insurance (UI) Appeals Board ruled that positive drug tests can disqualify discharged workers from receiving unemployment compensation, if employees agree to the tests and the tests are scientifically accurate. The Board said that every employer and employee has a vital interest in its workplace being drug free. The Board added that it is the right of an employer or other employees to create and maintain a workplace free of illegal drugs.

The Board ruled that for purposes of the UI law, drug tests were permissible when employers have reasonable suspicion that an employee in an inherently dangerous occupation is impaired.[32]

Employees can also be disqualified from receiving workers' compensation benefits based on drug test results. Under workers' compensation laws, you are not liable for injuries that employees sustain while on the job, nor for the death of any employee if the injury or death was caused by alcohol intoxication or the unlawful use of a controlled substance.[33]

Drug or Alcohol Rehabilitation

Current illegal drug use is not a protected disability under the federal Americans with Disabilities Act or the state Fair Employment and Housing Act and current users are not protected from discrimination.

Under the California Labor Code, if you have 25 or more employees, you must reasonably accommodate any employee who volunteers to enter an alcohol or drug rehabilitation program, if the reasonable accommodation does not impose an undue hardship on you.[34] Reasonable accommodation includes time off with or without pay and adjusting working hours. You need not provide time off with pay. An employee who is absent for alcohol or drug rehabilitation can use sick leave pay to which he/she is entitled.[35]

Employees can file a complaint with the Labor Commissioner if they believe their employer denied reasonable accommodation.[36] You must take reasonable measures to safeguard the employee's privacy about the fact that he/she entered alcohol or drug rehabilitation.[37] You or your representative cannot misrepresent the performance record of an employee who voluntarily left to enter rehabilitation or prevent the employee from getting another job.[38]

This law does not prohibit an employer from refusing to hire or discharging an employee who, because of his/her current drug or alcohol use, is unable to perform his/her duties or endangers the health and safety of others.

Even if you are not required to provide rehabilitation, you should consider offering this option rather than discharging an employee. Programs designed to assist employees and deter drug use are good policy. They are also more likely to be looked upon favorably by juries in wrongful termination cases than programs aimed at punishing employees with admitted drug or alcohol problems.

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[32] *Ables v. Shultz Steel Co.* No. P-B-454 (1987)
[33] Lab. Code sec. 3600
[34] Lab. Code sec. 1025
[35] Lab. Code sec. 1027
[36] Lab. Code sec. 1028
[37] Lab. Code sec. 1026
[38] Lab. Code sec. 1050

Employee Assistance Programs (EAPs) and Drug and Alcohol Rehabilitation

Many organizations developed EAPs to provide treatment and counseling for employees' drug- and alcohol-related problems and to address financial, emotional and other personal problems related to these areas. EAPs enable you to address the issue of drugs in the workplace in a nonthreatening and cost-effective manner. Although you may be reluctant to incur the cost of instituting an EAP, many organizations faced with an extensive drug problem are likely already paying a high price in absenteeism, accidents, workers' compensation claims, poor performance and medical costs. Successful treatment under an EAP can considerably reduce these costs. In addition, implementing an EAP can improve employee morale by demonstrating to employees the humane manner in which you address the issue.

The EAP's goal can be rehabilitation and prevention. It can be established in-house, by using an outside program or a combination of the two. In addition, an EAP can offer a number of services, ranging from referral to treatment to employee education to an explanation of options for an employee concerned about his/her own use of drugs or alcohol.

Referral to an EAP can occur in several ways. The most widely used approach is constructive confrontation. Constructive confrontation generally uses a system of progressive discipline to provide employees feedback on work performance and to modify their behavior. At each disciplinary step, the employee is offered help through the EAP.

Constructive confrontation serves two purposes, identifying troubled employees and attempting to motivate them to change their behavior.

For constructive confrontation to be successful, supervisors must be well-trained and willing to use the strategy.

Termination for Violating Drug Testing Agreement

In *Gosvener v. Coastal Corp.*, a California Court of Appeal refused an employee's claim that he was wrongfully terminated when he failed to comply with the terms of a drug treatment plan to which he had agreed. After the employee divulged a drug and alcohol problem, the employer paid for treatment at a private clinic, temporarily assigned the employee to a less stressful position at full pay and entered into a rehabilitation and treatment agreement with the employee. The employer terminated the employee when he allowed unsafe work to be performed, appeared at work under the influence of alcohol and/or drugs, missed work on several occasions and failed to attend required therapy sessions.[39]

Drug-Free Workplace Policies

You may want to create a drug-free workplace policy, regardless of whether your organization is required to do so under the Drug-Free Workplace Act. You may also want to add a policy or create a drug-free workplace provision to your employee handbook.

Drug-Free Workplace Policy Guidelines

Take the following steps when developing a drug-free workplace policy:

- Thoroughly brief all supervisors about the drug-free workplace program and impress upon them the purpose and seriousness of the policies.

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[39] *Gosvener v. Coastal Corp.*, 51 Cal. App. 4th 805 (1996)

- Train your supervisors to identify signs of drug or alcohol use. Typical signs are frequent absences, chronic tardiness or early departure, excessive use of leave, bankruptcy, increased medical claims, decreased productivity, theft, misrepresentations, lying or accidents resulting in injury. Employees who exhibit a relatively sudden personality change are often suspect. Supervisors should keep written records of problems and review them for patterns. Remember that employers cannot take actions against employees for absences that are protected by law, such as absences protected by FMLA/CFRA.
- Establish a policy banning the use, possession or sale of drugs in the workplace and on company property. The policy should assert that drug use is extremely harmful to employees' health, interferes with productivity and alertness and that an employee under the influence of drugs is a danger to himself/herself and to fellow employees.
- Establish a disciplinary policy for those found using, possessing or selling drugs on company premises. Discipline can range from a warning to immediate termination of employment. Emphasize a counseling and/or a rehabilitation program. Any court that hears an employee challenge to an employer's drug-free workplace policy will look favorably on this emphasis.
- Identify areas of high risk (areas that contain hazardous materials, machines requiring high skills, or other potentially dangerous equipment, etc.) and jobs where drug-impaired personnel may place other employees or members of the general public at risk. The security and safety of employees, property and the company's clientele are your primary goals. Remember, there must be a connection between any job you designate as requiring drug testing and a legitimate business need. Subject all violations of the company's drug policy to company disciplinary actions.
- Ask supervisors to review the completed outline of a drug-free workplace policy. Their input is important because they will eventually police employees. The policy should clearly state the supervisors' role. You may choose to ask employees for comments before putting the plan into effect.
- Advise all employees in writing of the program and have them to sign a statement acknowledging they have read your policy. This form should be placed in the employee's personnel file. You must make the program clear to all employees, along with an announcement of when the policy becomes effective and, advising all employees of a grace period if one has been adopted.
- Consider financing a rehabilitation plan or giving time off, with or without pay, to permit employees to enroll in a rehabilitation plan. Be careful to establish clear rules concerning those who would qualify for the company's rehabilitation plan. Working under a federal contract requires you to establish an employee assistance program. State law requires California employers to reasonably accommodate employees who wish to enter an alcohol or drug rehabilitation program.
- Follow-up on the program once it has been installed. One person should have the responsibility for monitoring and coordinating the program. This responsibility should include counseling employees, enforcing drug testing, recommending discipline and rehabilitation programs and working out the termination procedure. Include a serious employee educational program in the drug-free workplace policy.

Drug Testing as Part of Policy

If you decide to make drug testing part of your drug-free workplace policy, consult with legal counsel. You must decide:

- Which jobs require drug testing? Consider jobs that involve employee safety, public safety, or company or national security. Remember that a drug testing requirement must always be closely job-related.
- When do you test an employee? Before employment? On reasonable suspicion? Only in certain workplaces?
- What are the costs of drug testing? Drug testing should be conducted only by a licensed laboratory acting under U.S. Department of Health and Human Services guidelines.
- What penalties should the employee expect if tests are positive? What procedures, if any, should be followed after a drug violation is determined?
- If you have adopted a rehabilitation policy, at what point should you require the employee to enroll in it?
- What is the company policy if an employee refuses to be tested or to enter a rehabilitation program?

You must retain drug testing records in a private file separate from the employee's personnel file for at least as long as you would retain any other medical record.

Alcohol at Workplace Functions

Many employers choose to serve alcohol at workplace functions, such as annual office holiday parties.

However, employers can be liable for an employee's drunk-driving accident — even if the accident occurs after the work function is over. In one case, an employee, Michael Landri, made it home safely from an office holiday party but went out later that night and drove his vehicle while still intoxicated from the party. Unfortunately, the employee killed another driver in a high-speed crash. The court found that the employer, a Marriot hotel, could be held liable.[40]

The parents of the deceased driver sued Landri and Marriott for wrongful death. Marriott argued that it could not be liable because Landri was engaged in purely personal conduct when he left home after first arriving there safely and, according to Marriott, Landri's travel was unrelated to work.

The court disagreed because the consumption of alcohol that eventually led to the accident was employment related, and the intoxication itself occurred during the scope of the employment. The court ruled that an employer can be liable if the activities that caused the employee to harm others were either:

- Undertaken with the employer's permission and were of some benefit to the employer; or
- A customary incident of employment.

The court stated that Marriott received at least a tangential "benefit" from the holiday party and the drinking of alcohol. The party was intended as a form of employee appreciation and was meant to improve employee morale and further employer/employee relations.

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[40] *Purton v. Marriott International, Inc.*, 218 Cal.App.4th 499 (2013)

The drinking of alcohol was also a customary incident of employment. The employees had permission to drink and Marriott did not follow its own rules relating to serving only beer and wine and permitted the consumption of hard alcohol. Employees finished alcohol leftover from parties, tasted new drinks and could have drinks purchased for them, and management never said anything about it.

According to the court, Marriott could not "ignore the fact that it created the risk of harm at its party by allowing an employee to consume alcohol to the point of intoxication." Liability, according to the court, continues until the risk that was created within the scope of employment "dissipates." In other words, in the case of alcohol consumption related to work, the employer is potentially on the hook until the employee sobers up.

Employers should consider whether they should serve alcohol at company functions given the risk of liability. If alcohol is served, several measures should be in place to lessen the risk, such as enforcing a drink ticket policy, serving drinks for only a limited time, offering transportation, and monitoring the situation.

As the court noted, the only way to completely eliminate the risk of harm to others and the risk of potential liability, is to forbid alcohol at company functions entirely.

For information on employer liability in relation to commuting, please see "Employer Liability for Employee Actions During Commute" in Chapter 12, page 311.

Smoking in the Workplace

For several decades, smoking in public has been hotly debated. In California, legislation began in the mid-1990's, resulting in a 1995 law that placed a uniform statewide ban on smoking in the workplace. Limited exceptions are allowed. The state law specifically supersedes any local ordinances regulating smoking in the workplace.[41]

Prohibiting Smoking in Enclosed Spaces

You cannot knowingly permit the smoking of tobacco products in an enclosed space at a place of employment. This prohibition includes permitting nonemployees to smoke in an enclosed workplace. The law exempts a number of workplaces from these prohibitions, as discussed in "Exceptions to the Ban on Workplace Smoking" on page 213.

The prohibition on knowingly permitting smoking in enclosed spaces in places of employment includes lobbies, lounges, waiting areas, stairwells, elevators and restrooms. It prohibits smoking inside public buildings, except in covered parking lots.[42]

Preventing Nonemployees From Smoking

When you permit nonemployees admission to the workplace on a regular basis, you must take the following steps to prevent liability for violating the statewide smoking ban when nonemployees smoke on the premises:[43]

- Where smoking is prohibited throughout the building, a sign stating "No Smoking" must be posted at each entrance to the building.

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[41] Lab. Code sec. 6404.5

[42] Govt. Code sec. 7596; Lab. Code sec. 6404.5

[43] Lab. Code sec. 6404.5

- Where smoking is permitted in designated areas of the building under one of the law's limited exceptions, a sign stating "Smoking is prohibited except in designated areas" must be posted at each entrance to the building.
- Nonemployees who are smoking must be requested, where appropriate, to refrain from smoking. The law does not define when it is appropriate to make a request.

The law specifies that it is not necessary, in complying with the law, to:

- Physically eject a nonemployee from the workplace.
- Make a request to a nonemployee to refrain from smoking under circumstances involving a risk of physical harm to your employees.

Exceptions to the Ban on Workplace Smoking

The following places of employment are exempt from the complete ban on smoking in the workplace:[44]

- Sixty-five percent of the guest room accommodations in a hotel, motel or similar transient lodging establishment
- Areas of the lobby in a hotel, motel or other similar transient lodging establishment designated for smoking by the establishment. An establishment can permit smoking in a designated lobby area that does not exceed 25 percent of the total floor area of the lobby or, if the total area of the lobby is 2,000 square feet or less, an area that does not exceed 50 percent of the total floor area of the lobby. "Lobby" means the common public area of an establishment in which registration and other similar transactions are conducted and in which the establishment's guests and members of the public typically congregate.
- Meeting and banquet rooms in a hotel, motel or similar transient lodging establishment; restaurant; or public convention center, if the room is not being used for exhibit purposes and food or beverage functions are not taking place. Food and beverage functions include set-up, service and clean-up activities. At times when smoking is not permitted in a meeting or banquet room, the establishment can permit smoking in corridors and function areas adjacent to and serving the meeting or banquet room if an employee is not stationed in that corridor or area other than on a passing basis.
- "Private smokers' lounges," defined as any enclosed area in or attached to a retail or wholesale tobacco shop dedicated to the use of tobacco products, including cigars and pipes
- "Retail or wholesale tobacco shops," defined as any business establishment in which the main purpose is the sale of tobacco products, including cigars, pipe tobacco and smoking accessories
- Cabs of motor trucks or truck tractors if no nonsmoking employees are present
- Warehouse facilities with more than 100,000 square feet of total floor space and 20 or fewer full-time employees working at the facility. Smoking is not permitted in any area within a facility that is used as office space.
- Theatrical production sites, if smoking is an integral part of the story in the theatrical production
- Medical research or treatment sites, if smoking is integral to the research and treatment being conducted
- Private residences, except for private residences licensed as family day care homes, during the hours of operation as family day care homes and in those areas where children are present
- Patient smoking areas in long-term health care facilities

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[44] Lab. Code sec. 6404.5(d)

- Break rooms you designate for smoking, if all of the following conditions are met:
  - An exhaust fan must divert air from the smoking room directly to the outside. Air from the smoking room cannot be recirculated to other parts of the building.
  - You must comply with any ventilation standard or other standard using appropriate technology, including mechanical, electronic and biotechnical systems, adopted by the Occupational Safety and Health Administration (OSHA) or the federal Environmental Protection Agency (EPA).
  - The smoking room must be located in a nonwork area where no one, as part of his/her work responsibilities, is required to enter. Work responsibilities do not include any custodial or maintenance work carried out in the break room when it is unoccupied.
  - There are sufficient nonsmoking break rooms to accommodate nonsmokers.

Exception for Employers of Five or Fewer Employees

If you have a total of five or fewer full- and part-time employees, you can permit smoking in enclosed areas if all of the following conditions are met:

- The smoking area is not accessible to minors.
- All employees who enter the smoking area consent to permit smoking. No one can be required to work in an area where smoking is permitted. Using coercion to obtain consent or requiring an employee to work in the smoking area subjects an employer to a fine of up to $7,000.[45]
- Air from the smoking area must be exhausted directly to the outside by an exhaust fan. Air from the smoking area cannot be recirculated to other parts of the building.
- You must comply with any ventilation standard or other standard using appropriate technology, including mechanical, electronic and biotechnical systems, adopted by OSHA or the federal EPA.

Total Ban on Smoking Is Permissible

You retain the right to prohibit smoking in an enclosed place of employment for any reason. Even if you are totally or partially exempted under the law, you can nonetheless choose to prohibit smoking in the workplace entirely.

Electronic Cigarettes

The issue of smoking in the workplace became more complicated with the rise of the relatively new electronic cigarettes, or "e-cigarettes." The generic term applies to a variety of battery-operated products that vaporize liquid containing nicotine so that the vapor can be inhaled by users. The use of the products, sometimes called "vaping," has raised new questions about whether people should be able to use them in the workplace.

Employers looking for guidance will find little official word. It's clear that employers have a legal duty to provide a safe workplace for all employees. But it's not yet clear if the vapor emitted by e-cigarettes or other vaporizing devices has a negative effect on people who breathe it in second-hand.

The Food and Drug Administration is still looking into how to best regulate e-cigarettes. The agency has issued a proposed rule to extend its authority over tobacco products to e-cigarettes. In September

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[45] Lab. Code sec. 6427

2013, attorneys general from 40 states, including California, sent a letter to the FDA urging the agency to regulate e-cigarettes.

Currently, e-cigarettes do not fall under California's state-wide ban on smoking in the workplace, but efforts are underway to address that gap in coverage.

In the meantime, some localities are taking their own steps. For instance, Marin County and Santa Clara County prohibit the workplace use of e-cigarettes.

The California Department of Industrial Relations has, to date, not issued specific guidance on electronic cigarettes in the workplace.

Although no guidance exists on this issue, many employers choose to treat e-cigarettes like regular cigarettes in the workplace. Right now there is nothing that says employers have to allow for it, and employers can set policies regarding their workplace if they are concerned about possible health effects or distractions in the workplace.

Proceed with caution in this developing area. Be ready to adjust policies as the regulatory environment evolves. Check your local ordinances to see if your city or county is regulating e-cigarettes.

Fines for Violating the Smoking Ban

Violating the statewide workplace smoking ban is punishable by a fine up to $100 for the first violation, $200 for the second violation and $500 for the third and subsequent violations in one year.[46]

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[46] Lab. Code sec. 6404.5(j)

Wage and Hour Laws

California's wage and hour laws rank among the toughest in the nation. When federal law sets a standard, California law often goes beyond that standard, requiring more of employers. With dual sets of regulations, it make compliance challenging for California employers.

This section explains federal and state wage and hour laws. You will learn how federal and state law interrelate and which prevails when provisions conflict. It thoroughly discusses all sources of wage and hour law:

- The federal Fair Labor Standards Act (FLSA)
- The California Labor Code
- Wage Orders created by California's Industrial Welfare Commission (IWC)

The section also explains:

- The 17 California Wage Orders and how to determine which apply to your business
- How the law is enforced
- Requirements for record keeping
- Penalties for noncompliance

For information on how specific industries may be regulated, see "Wage and Hour Requirements for Specific Industries" in Chapter 11, page 291.

State Versus Federal Law: Which Prevails?

As a California employer, you are subject to labor laws and regulations from the state and federal governments and from other jurisdictions that legislate on employment matters. For example, San Francisco adopted its own minimum wage ordinance (see "Local Minimum Wage Ordinances" in Chapter 11, page 245) and many local governments adopted their own living wage laws (see "Living Wage Versus Minimum Wage" in Chapter 11, page 247).

When these laws conflict, often there is no easy answer to the question of which law prevails. In general, you must follow the law most restrictive to the employer and most generous to the employee. The ***2016 California Labor Law Digest*** includes federal and state law, and examples of which rule you must follow in a given instance.

In most instances, employers and unions cannot use the collective bargaining process to waive individual employee rights under state employment law even though that process is regulated by federal law.

California's Wage Orders

California's Department of Industrial Relations (DIR) regulates wages and hours of nonexempt employees. DIR established an Industrial Welfare Commission (IWC), which created documents called Wage Orders. Wage Orders are numbered 1 through 17, with each number followed by the year in which the Wage Order was last amended and reprinted. The IWC is currently not in operation. The Division of Labor Standards Enforcement (DLSE) continues to enforce the provisions of the wage orders. In addition, wage and hour changes may be made through the legislative process.

California employers must comply with 17 Wage Orders, plus a Minimum Wage Order, as well as any applicable statute. Each of the Wage Orders is specific to the industry or occupations it covers. You can find a description of each of the 17 Wage Orders in "Wage Order Listings" on page 222. In each Wage Order, you can find regulations on the following topics:

- Hours and days of work
- Minimum wages
- Overtime
- Alternative workweeks
- Reporting time pay
- Special licenses for disabled employees
- Record retention
- Cash shortage and breakage
- Uniforms and equipment
- Meals and lodging
- Meal periods
- Rest periods
- Change rooms and resting facilities
- Temperature
- Seats

You must understand which Wage Order covers your business to comply with wage and hour laws in California.

After you determine the proper Wage Order for your business, you must post a copy of it in your workplace where it is available for all employees to view.

For help in complying with the IWC orders, see the *Wage Order Checklist* in your online formspack and CalChamber's Wage Order Wizard at www.hrcalifornia.com.

Current effective Wage Orders are listed in the Wage Order Checklist.

Review Your Wage Order

The Wage Orders contain different requirements for different occupations. During your review, pay special attention to some of the more obscure provisions of the Wage Orders. For example, many

Wage Orders include a "suitable seating" requirement. For more information on this requirement, see "Suitable Seating" in Chapter 11, page 289.

Once you determine the Wage Order for your business, review the entire wage order. Some employers have faced lawsuits over allegations of Wage Order violations pertaining to the employers' failure to provide seats, not paying reporting time pay and not providing itemized wage statements.

Carefully review all sections of the Wage Order that apply to your business.

Wage Order Posting Requirement

All California employers must post the following items:

- At least 1 of the 17 industry-specific Wage Orders.
- California's Minimum Wage Order.

Download copies of these required orders from www.hrcalifornia.com. The *Wage Orders - Business Occupation Listing*, found in your online formspack, can help you determine which Wage Order covers your organization.

Employee Classification

To determine which Wage Order covers an employee or group of employees, you must first determine if your business is covered by one of the industry orders. If it is, the industry order covers all classifications of employees regardless of the kind of work they do, unless they are specifically exempted by the applicability section of that order. Industry orders include all but Wage Order 4, Wage Order 14, Wage Order 15 and Wage Order 17, which are occupation orders, and the Minimum Wage Order.

> **Example:** A clerical employee employed by a toy maker works in the manufacturing organization covered by Wage Order 1, Manufacturing Industry. A driver who delivers supplies for a chain of beauty shops in the personal service industry is covered by Wage Order 2, Personal Services Industry. A mechanic who works for a retail chain is covered by Wage Order 7, Mercantile Industry.

If your business cannot be covered by an industry-wide order because it does not fall within the definition of any covered industry, you must examine the employee's occupation to see which one of the occupation orders applies.

> **Example:** An employee is a nurse — in what kind of establishment? He/she might be an industrial nurse employed by a manufacturer under Wage Order 1, by a weight-control establishment under Wage Order 2 or by a hospital under Wage Order 5. If the employer operated a clinic that did not provide overnight beds or meals, the clinic would not be covered by any industry order. But the nurse would be in an occupation covered by Wage Order 4. The same is true of a nurse employed by a registry. When dispatched to a Wage Order 5 hospital, however, that nurse would be subject to the applicable conditions of Wage Order 5, and a joint employment relationship exists.

Determining the Correct Wage Order

An industry, business or establishment must generally comply with the Wage Order applicable to the main purpose of the business, except Wage Order 5, Public Housekeeping Industry. For more information, see "Incidental Housekeeping Activities" on page 224. Most large businesses conduct a variety of operations, but where they all tend to carry out a common business purpose under common general control, they are treated as one business.

> **Example:** A manufacturer with a production plant in California may have a separate warehouse and a fleet of trucks and separate sales offices to handle distribution of the manufacturer's products. All are part of one business under Wage Order 1.

Employers Not Covered by Industry Orders

Most employers who are not covered by industry orders are engaged in listed or related occupations covered by Wage Order 4, Professional, Technical, Clerical, Mechanical and Similar Occupations. Several major types of businesses do not have industry-wide orders. The IWC treats these businesses as Wage Order 4 businesses. Some organizations and businesses that generally employ the classes of occupations covered by Wage Order 4 include banks, newspapers, public utilities, insurance companies and many others indicated in the listing of businesses by order.

Industries and occupations not covered by Wage Orders 1 through 16 may be covered by Wage Order 17, Miscellaneous Employees. These may include newly emerging industries and jobs in high technology and other fields as they develop over time.

Occupation Orders

If your business is not covered by a Wage Order, your employees normally are covered by an Occupation Order, listed below:

Occupation Order Number	Occupation
Order 4-2001	Professional, Technical, Clerical, Mechanical and Similar Occupations
Order 14-2001	Agricultural Occupations
Order 15-2001	Household Occupations

Separate Units of Multipurpose Organizations

Some multipurpose organizations may consist of distinctly separate units. If the units are different, are operating for distinctly different business purposes and the operational management is organized separately at all levels, you can classify these units separately by division or establishment.

> **Example:** A large retail department store chain also owns an insurance company and a savings and loan company whose representatives have office space in the stores. But each company operates separately as separate corporate identities. They are classified separately, but the retail business's fleet of trucks, appliance installers, etc., are part of the mercantile industry under Wage Order 7. If that company owns any of the factories producing items under its brand name, the factories are under Wage Order 1. It may help to ask: Who is the competition? In this case, is the unit in question in competition with banking institutions, insurance companies or other retail stores?

Businesses of a Mixed Nature

To avoid classification problems, businesses that engage in multiple activities should define their primary purpose. This does not mean auditing receipts to compare income from sales and services offered, but determining the nature of the business on the basis of simple observation and common sense.

Examples:

- A car wash establishment that operates for the purpose of cleaning and maintaining vehicles is under Wage Order 9, Transportation Industry, even if it offers a gas pump or two and a few items for sale. On the other hand, an establishment with car wash facilities and several rows of pumps is mostly in the business of selling gasoline under Wage Order 7, Mercantile Industry. This might be emphasized by a sign offering a bargain car wash with a fill-up.
- A bakery where there are no tables is a retail establishment under Wage Order 7, Mercantile Industry, but if there are tables for patrons' use, it is a Wage Order 5, Public Housekeeping Industry, establishment. The same principle can be applied to stores selling ice cream.
- A gift shop operated as part of the general facilities of a hotel would be under Wage Order 5, Public Housekeeping Industry.
- A publishing organization that prints books or magazines is manufacturing products under Wage Order 1, Manufacturing Industry. But a newspaper organization is disseminating news, a business purpose not covered by an industry order, so Wage Order 4, Professional, Technical, Clerical, Mechanical and Similar Occupations covers its employees.
- A garage operating for the purpose of repairing cars is in the transportation industry under Wage Order 9, Transportation Industry. But the service department of a vehicle dealer, whose main purpose is to sell cars, falls under Wage Order 7, Mercantile Industry. Similarly, a garage operated as a secondary activity by a service station, which is in business mostly for the purpose of selling gas, tires, etc., is a Wage Order 7 garage.
- A company producing motion pictures or programs on videotape for corporate customers would be under Wage Order 12, Motion Picture Industry even if it made and distributed several copies of a program. But a firm mostly in the business of manufacturing and/or reproducing tapes for wholesale, would fall under Wage Order 1, Manufacturing Industry.

Wage Orders and Temporary Agency Employees

Temporary agency employees who are sent to work for other employers are covered by the order that covers the on-site employer where they perform work. An employee of ABC Temp Services sent to work a temporary job at XYZ Manufacturing would work under Wage Order 1 Manufacturing, while working at XYZ. If the temp agency sent that same employee to another temporary job at Limelight Movie Studios, he/she would work under Wage Order 12, Motion Picture Industry. Wage Order 4, Professional, Technical, Clerical, Mechanical and Similar Occupations, covers employees directly employed by the temporary service, for example, those taking job orders, delivering training or assigning work.

Temporary agency employees must be paid by their on-site employers weekly. If an employee is assigned to a client on a day-to-day basis or if a client is engaged in a trade dispute, then the employees must be paid daily. This wage schedule requirement does not apply to employees who are assigned to a client for more than 90 consecutive calendar days. Failure to pay wages on schedule can result in civil and criminal penalties.[1]

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[1] Lab. Code secs. 203(a), 210

Wage Order Listings

This section lists California's 17 Wage Orders, along with a description of the industries or occupations covered by each. These descriptions are substantially the same as they appear in the Wage Orders.

You should carefully review the contents of the Wage Order that applies to your company because there are important differences in the Wage Orders.

Wage Order 1 - Manufacturing Industry

"Manufacturing industry" means any industry, business or establishment operated for the purpose of preparing, producing, making, altering, repairing, finishing, processing, inspecting, handling, assembling, wrapping, bottling or packaging goods, articles or commodities, in whole or in part; except when these activities are covered by orders in the:

- Canning, preserving and freezing industry
- Industries that handle products after harvest
- Industries that prepare agricultural products for market, on the farm
- Motion picture industry

Wage Order 01 - Manufacturing

Wage Order 01 - Manufacturing - Spanish

Wage Order 2 - Personal Services Industry

"Personal service industry" means any industry, business or establishment operated for the purpose of rendering, directly or indirectly, any service, operation or process used or useful in the care, cleansing or beautification of the body, skin, nails or hair, or in the enhancement of personal appearance or health; including but not limited to, beauty salons, schools of beauty culture offering beauty care to the public for a fee, barber shops, bath and massage parlors, physical conditioning, weight control salons, health clubs and mortuaries.

Wage Order 02 - Personal Services

Wage Order 3 - Canning, Freezing and Preserving Industry

"Canning, freezing and preserving industry" means any industry, business or establishment operated for the purpose of canning soups, or of cooking, canning, curing, freezing, pickling, salting, bottling, preserving or otherwise processing any fruits or vegetables, seafood, meat, poultry or rabbit product, when the purpose of this processing is the preservation of the product and includes all operations.

Wage Order 03 - Canning, Freezing and Preserving

Wage Order 4 - Professional, Technical, Clerical, Mechanical and Similar Occupations

"Professional, technical, clerical, mechanical and similar occupations" includes professional, semi-professional, managerial, supervisory, laboratory, research, technical, statisticians, clerical, office work and mechanical operations. These occupations include:

- Accountants, agents, appraisers, artists, attendants and audiovisual technicians
- Bookkeepers, bundlers and billposters
- Canvassers, carriers, cashiers, checkers, clerks, collectors, communications and sound technicians, compilers, copy holders, copy readers, copy writers and computer programmers or operators
- Demonstrators, display representatives, dispatchers, distributors, doorkeepers and drafters
- Elevator operators, estimators and editors
- Graphic arts and technicians, guards and guides
- Hosts
- Inspectors, installers, instructors, interviewers and investigators
- Librarians and laboratory employees
- Machine operators, mechanics, mailers, messengers, medical and dental technicians and technologists and models
- Nurses
- Packagers, photographers, porters and cleaners, proofreaders, process servers and printers
- Salespeople, sales agents, secretaries, sign erectors, sign painters, social workers, solicitors and stenographers
- Teachers, telephone, radio, telephone-telegraph and call-out operators
- Tellers
- Ticket agents
- Tracers
- Typists
- Vehicle operators
- X-ray technicians and their assistants
- Other related occupations listed as professional, semi-professional, technical, clerical, technical and kindred occupations

Wage Order 04 - Professional, Technical, Clerical, Mechanical and Similar Occupations

Wage Order 5 - Public Housekeeping Industry

"Public housekeeping industry" means any industry, business or establishment that provides meals, housing or maintenance services whether operated as a primary business or when incidental to other operations in an establishment not covered by an industry order of the commission, and includes:

- Restaurants, night clubs, taverns, bars, cocktail lounges, lunch counters, cafeterias, boarding houses, clubs and all similar establishments where food in either solid or liquid form is prepared and served to be consumed on the premises
- Catering, banquet, box lunch services and similar establishments that prepare food for consumption on or off the premises
- Hotels, motels, apartment houses, rooming houses, camps, clubs, trailer parks, office or loft buildings and similar establishments offering rental of living, business or commercial quarters
- Hospitals, sanitariums, rest homes, child nurseries, child care institutions, homes for the aged and similar establishments offering board or lodging in addition to medical, surgical, nursing, convalescent, aged or child care services
- Private schools, colleges or universities and similar establishments that provide board or lodging in addition to educational facilities
- Establishments contracting for development, maintenance or cleaning of grounds, maintenance or cleaning of facilities and/or quarters of commercial units and living units
- Establishments providing veterinary or other animal care services

Incidental Housekeeping Activities

Wage Order 5 Public Housekeeping Industry does not limit coverage to businesses whose main purpose is providing meals, housing or maintenance services. Instead, the Wage Order specifies that if any business provides any of these things to the public, even incidentally, and is not covered by a different industry order, it is part of the public housekeeping industry under Wage Order 5.

Example: A factory that operates a cafeteria is covered by Wage Order 1, Manufacturing Industry so it is not covered by Wage Order 5. A private school that is not covered by an industry order and that provides dormitories or dining facilities is covered by Wage Order 5. Where a concessionaire contracts to operate lodging or dining facilities, the concessionaire's business is under Wage Order 5 and the rest of the enterprise (school, factory, etc.) is otherwise classified.

Wage Order 05 - Public Housekeeping

Wage Order 6 - Laundry, Linen Supply, Dry Cleaning and Dyeing Industry

"Laundry, linen supply, dry cleaning and dyeing industry" means any industry, business or establishment operated for the purpose of washing, ironing, cleaning, refreshing, restoring, pressing, dyeing, storing, fumigating, mothproofing, waterproofing or any other associated processes, on articles or fabrics of any kind, including clothing, hats, draperies, rugs, curtains, linens, household furnishings, textiles, furs or leather goods; and includes self-service laundries, self-service dry cleaning establishments and similar types of commercial establishments; and the collection, distribution, storage, sale or resale at retail or wholesale of the foregoing services.

Wage Order 06 - Laundry, Linen Supply, Dry Cleaning and Dyeing

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Wage Order 7 - Mercantile Industry

"Mercantile industry" means any industry, business or establishment operated for the purpose of purchasing, selling or distributing goods or commodities at wholesale or retail, or for the purpose of renting goods or commodities.

Wage Order 07 - Mercantile

Wage Order 8 - Industries Handling Products After Harvest

"Industries handling products after harvest" means any industry, business or establishment operated for the purpose of grading, sorting, cleaning, drying, cooling, icing, packing, dehydrating, cracking, shelling, candling, separating, slaughtering, picking, plucking, shucking, pasteurizing, fermenting, ripening, molding or otherwise preparing any agricultural, horticultural, egg, poultry, meat, seafood, rabbit or dairy product for distribution and includes all the associated operations.

Wage Order 08 - Industries Handling Products After Harvest

Wage Order 08 - Industries Handling Products After Harvest - Spanish

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Wage Order 9 - Transportation Industry

"Transportation industry" means any industry, business or establishment operated for the purpose of conveying people or property from one place to another, whether by rail, highway, air or water, and all associated operations and services; and also includes storing or warehousing of goods or property and the repairing, parking, rental, maintenance or cleaning of vehicles.

Wage Order 09 - Transportation

Wage Order 10 - Amusement and Recreation Industry

"Amusement and recreation industry" means any industry, business or establishment operated for the purpose of furnishing entertainment or recreation to the public, including amusement parks, athletic fields, theaters, dance halls, bowling alleys, billiard parlors, skating rinks, riding academies, race tracks, swimming pools, gymnasiums, golf courses, tennis courts, carnivals and wired music studios.

Wage Order 10 - Amusement and Recreation

Wage Order 11 - Broadcasting Industry

"Broadcasting industry" means any industry, business or establishment operated for the purpose of broadcasting or taping and broadcasting programs through the medium of radio or television.

Wage Order 11 - Broadcasting

Wage Order 12 - Motion Picture Industry

"Motion picture industry" means any industry, business or establishment operated for the purpose of motion picture or television film production, or primarily allied with theatrical or television motion picture productions, including motion pictures for entertainment, commercial, religious or educational purposes, whether made by film, tape or otherwise.

Wage Order 12 - Motion Picture Industry

Wage Order 13 - Industries Preparing Agricultural Products for Market, on the Farm

"Industries preparing agricultural products for market, on the farm" means any operation performed in a permanently fixed structure or establishment on the farm or on a moving packing plant on the farm for the purpose of preparing agricultural, horticultural, egg, poultry, meat, seafood, rabbit or dairy products for market when these operations are done on the premises owned or operated by the same employer who produced the products referred to herein, and includes all operations incidental thereto.

Wage Order 13 - Industries Preparing Agricultural Products for Market on the Farm

Wage Order 13 - Industries Preparing Agricultural Products for Market on the Farm - Spanish

Wage Order 14 - Agricultural Occupations

Wage Order 14 covers agricultural occupations related to the maintenance of soil, buildings and machinery that constitute the basic farm facilities and to the cultivation and handling of farm commodities up through harvest, including field packing and transportation to the place of first processing or distribution. Employees in these occupations can work for the grower, for a farm labor contractor or for an organization providing agricultural services.

"Agricultural occupations" mean any of the following described occupations:

- Preparation, care and treatment of farm land, pipeline or ditches, including leveling for agricultural purposes, plowing, discing and fertilizing soil
- Sowing and planting any agricultural or horticultural commodity
- Care of any agricultural or horticultural commodity. "Care" includes cultivation, irrigation, weed control, thinning, heating, pruning or tying, fumigating, spraying and dusting.
- Harvesting any agricultural or horticultural commodity, including picking, cutting, threshing, mowing, knocking off, field chopping, bunching, baling, balling, field packing and placing in field containers or in the vehicle in which the commodity will be hauled and transportation on the farm or to the place of first processing or distribution

- Assembly and storage of any agricultural or horticultural commodity, including loading, road siding, banking, stacking, binding and piling
- Raising, feeding and managing livestock, furbearing animals, poultry, fish, mollusks and insects, including herding, housing, hatching, milking, shearing, handling eggs and extracting honey
- The harvesting of fish, as defined by Section 45 of the Fish and Game Code, for commercial sale
- Conserving, improving or maintaining the farm and its tools and equipment

Farm Employees and Other Agricultural Occupations

Wage Order 14 covers agricultural occupations related to the maintenance of soil, buildings and machinery that constitute the basic farm facilities and to the cultivation and handling of farm commodities up through harvest, including field packing and transportation to the place of first processing or distribution. Employees in these occupations may work for the grower, for a farm labor contractor or for a company providing agricultural services.

Wage Order 14 does not cover all farm employees. If the grower has a packing or processing operation under Wage Order 8 or Wage Order 13, which are industry orders that cover handling operations after harvest, all of the support personnel on the farm and the packing house workers would fall under the industry order. These include clerical employees and drivers, for example. If there is not a Wage Order 8 or Wage Order 13 operation, the white collar workers would usually fall under Wage Order 4, but there are other possibilities. For example, if a grower operates a produce store or retail nursery substantial and distinct enough to constitute a separate mercantile business, Wage Order 7 would cover all of the employees connected with it in any way.

Although farm employers do often engage in various enterprises, the Division of Labor Standards Enforcement suggests that you should make every effort to limit the number of applicable Wage Orders to two, if possible — either the two occupation Wage Orders, 14 and 4, or Wage Order 14 and the industry order that best reflects the main purpose of your nonfarm operations.

Commercial Agricultural Services

Organizations providing commercial agricultural services employ some individuals who work on farms in agricultural occupations who fall under Wage Order 14, such as tractor drivers, etc. If the organization is in the business of selling chemicals, irrigation systems, etc., its other employees fall under Wage Order 7, Mercantile Industry. However, some organizations only contract to provide the service, so their support employees fall under Wage Order 4, Professional, Technical, Clerical, Mechanical and Similar Occupations.

Wage Order 14 - Agricultural Occupations

Wage Order 14 - Agricultural Occupations - Spanish

Wage Order 15 - Household Occupations

Wage Order 15 covers employees who work for private households in various kinds of occupations. “Household occupations” means all services related to the care of people or maintenance of a private household or its premises by an employee of a private householder. Said occupations shall include the following:

- Butlers
- Chauffeurs, companions and cooks
- Day workers

- Gardeners, graduate nurses and grooms
- House cleaners
- Housekeepers
- Maids
- Practical nurses
- Tutors
- Valets

The Domestic Worker Bill of Rights regulates the hours of work for certain domestic work employees and provides for specific overtime pay for "domestic work employees" who are "personal attendants," as defined under the law.[2] For more information, see "Requirements for Domestic Service" in Chapter 11, page 300.

Wage Order 15 - Household Occupations

Wage Order 16 - On-Site Construction, Drilling, Logging and Mining Industries

"On-site construction, drilling, logging and mining industries" includes all people employed in the on-site occupations of construction, including work involving alteration, demolition, building, excavating, renovation, remodeling, maintenance, improvement, repair work and work for which a contractor's license is required by the California Business and Professions Code Division 3, Chapter 9, sections 7025 et seq.; drilling, including all work required to drill, establish, repair and rework wells for the exploration or extraction of oil, gas or water resources; logging work for which a timber operator's license is required pursuant to California Public Resources Code sections 4571 through 4586; and mining (not covered by Labor Code section 750 et seq.), including all work required to mine and/or establish pits, quarries and surface or underground mines for the purposes of exploration or extraction of nonmetallic minerals and ores, coal and building materials such as stone and gravel, whether paid on a time, piece-rate, commission or other basis.

These on-site employees are entitled to daily and/or weekly overtime.[3]

Wage Order 16 - On-site Construction, Drilling, Logging and Mining

Wage Order 17 - Miscellaneous Employees

"Miscellaneous employees" means any industry or occupation not previously covered by, and all employees not specifically exempted in, the IWC's Wage Orders in effect in 1997 or otherwise exempted by law.

Wage Order 17 - Miscellaneous Employees

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[2] Lab. Code secs. 1450-1454

[3] Lab. Code sec. 510

Wage and Hour Enforcement and Penalties

Penalties may be assessed for violating the Labor Code's wage and hour provisions. The Division of Labor Standards Enforcement is charged with enforcing these laws and will adjudicate wage claims.

It is illegal for an employer and an employee to agree to a wage lower than the minimum wage.[4] For more information on minimum wage, please see "Minimum Wage" in Chapter 11, page 245.

Failure to pay the minimum wage subjects you to fines and imprisonment, and restitution of the wages to the employee. The state Labor Commissioner can assess a civil penalty of $100 for each underpaid employee for each pay period during which you did not pay the minimum wage. For each subsequent intentional failure to pay the minimum wage, the penalty is $250.[5]

The Labor Commissioner is also authorized to order liquidated damages in an amount equal to the amount of the wages improperly held, plus interest. In the past, employees could only obtain these damages through litigation.

> All California workers are protected by the state Labor Code; employers must comply with wage and hour laws. Even if employees are not legally eligible to work in the United States, you must pay them. For more information, see "California Immigration Protections" in Chapter 26, page 746.

Existing law allows the Labor Commissioner to issue a citation for a minimum wage violation and recover the civil penalty and wages. The penalty for a citation includes payment for liquidated damages.[6]

Unlawfully withholding wages or failing to pay the minimum wage is a misdemeanor. Any employee receiving less than the applicable minimum wage or the legal overtime compensation is entitled to recover in a civil action the difference between the wages paid and those due, including interest, reasonable attorneys' fees and costs of suit.[7] The employer may also be ordered by the court to refrain from further violations.[8]

In addition, courts may assess civil penalties against an employer or any other person acting on behalf of an employer where there is a violation of any wage and hour provision of the state Labor Code or any provision in any IWC Wage Order. For the first offense, the fine is $100 per underpaid employee plus 25 percent of the amount of underpaid wages. For the second and subsequent offenses, the fine is $200 per underpaid employee plus 25 percent of the amount of underpaid wages.[9]

Personnel Liable for Wage Enforcement Fines

Individuals can be held personally liable for a company's failure to comply with certain wage and hour laws. The Labor Commissioner's authority to assess civil penalties for Labor Code and Wage Order violations extends not only to the employer, but to any "other person acting on behalf of the employer."[10]

For instance, in 2016, two provisions were added to the Labor Code increasing the Labor Commissioner's ability to go after individuals for wage and hour violations.

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[4] Lab. Code sec. 223

[5] Lab. Code sec. 1197.1

[6] Lab. Code sec. 1194.2

[7] Lab. Code sec. 1194

[8] Lab. Code sec. 1194.5

[9] Lab. Code sec. 210

[10] Lab. Code sec. 558

First, Labor Code section 558.1 was enacted specifically stating that "any person acting on behalf of an employer" can be held liable when he/she violates (or causes to be violated) any of the following wage and hour laws:

- Minimum wages and any minimum wage provisions found in the Wage Orders
- Any provision regulating hours and days of work found in the Wage Orders
- Timely payment of wages (Labor Code section 203)
- Requirement to provide a pay stub/itemized wage statement (Labor Code section 226)
- Meal and rest break requirements (Labor Code section 226.7)
- Overtime (Labor Code section 1194)
- Reimburse employees for expenses incurred in the discharge of duties (Labor Code section 2802)

This statute limits the definition of "other person acting on behalf of an employer" to the following individuals:[11]

- Owner
- Director
- Officer
- Managing agent

Second, the Labor Commissioner's authority to conduct hearings to recover civil penalties was specifically expanded to include hearings against an individual acting on behalf of the employer.[12]

You might be required to reimburse your penalized employee for these fines under the state Labor Code section requiring an employer to reimburse an employee for all necessary expenses or losses in direct consequence of job performance.[13]

Waiting Time Penalty

If an employee is terminated or quits and you willfully fail to pay the employee in a timely fashion, you face an expensive penalty. You may be required to continue the exiting employee's wages on a day-to-day basis, up to a maximum of 30 days, until the final paycheck is ready.[14] This rule covers both exempt and nonexempt employees.[15]

A willful failure to pay need not include a showing of bad faith or evil intent. However, the waiting time penalty is excused if there is a good-faith dispute that no additional wages are due.[16]

In the event of a dispute over wages, you must pay, without condition, all wages you admit are due. You must pay any additional wages determined due by the Labor Commissioner within 10 days after receiving notice from the Labor Commissioner that wages are due. Failure to do so may subject you to a penalty of triple the amount due to the employee.[17]

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[11] Lab. Code sec. 558.1(b)
[12] Lab. Code sec. 98
[13] Lab. Code sec. 2802
[14] Lab. Code sec. 203
[15] *Mamika v. Barca*, 68 Cal. App. 4th 487 (1998)
[16] 8 CCR sec. 13520
[17] Lab. Code sec. 206

In addition, if you violate wage payment provisions when paying employees, you commit a misdemeanor.[18] Either the district attorney or the Division of Labor Standards Enforcement (DLSE) can sue to recover statutory penalties.[19]

In any court action brought for the nonpayment of wages, fringe benefits or pension fund contributions, the court must award reasonable attorneys' fees to the prevailing party if requested by the prevailing party. In *DLSE v. Lee*, a California court of appeal held that even the Labor Commissioner can be ordered to pay costs to the prevailing party in litigation.[20]

! You must follow specific rules pertaining to an employee's final paycheck. For more information, see "Final Pay" in Chapter 29, page 900.

Insufficient Paycheck Funds

If a paycheck is refused payment because you have no account with the bank or have insufficient funds, you are liable for one day's wages for each day until the amount is paid or until the employee files an action to recover the wages, up to a maximum of 30 days' wages. The employee must have attempted to cash or deposit the paycheck within 30 days of receiving it.[21]

The penalty does not apply if you can establish, to the satisfaction of the Labor Commissioner or court, that the violation was unintentional. The penalty also does not apply if the employee has recovered the returned check service charge under California's Civil Code.

Complaints and Appeals to Recover Unpaid Wages

Employees can file complaints with the Labor Commissioner to recover unpaid wages. The Labor Commissioner has the authority to:[22]

- Investigate these complaints.
- Hold hearings and take action to recover wages.
- Assess penalties and make demands for compensation.

Within 30 days of filing the complaint, the Labor Commissioner must notify the parties if a hearing will be held. If a hearing will be held, the hearing must occur within 90 days of the determination.[23]

When a hearing is set, a copy of the complaint and a notice of time and place of the hearing is served on all parties. These documents can be served personally or by certified mail or by leaving a copy at the served person's home or office. Another copy must be mailed to the person at the place where a copy was left. If left at a home, a person over the age of 18 must receive the copy. If left at an office, a person who appears to be in charge must receive the copy. The complaint must include the amount of compensation requested.[24]

The Labor Commissioner must file an order, decision or award within 15 days after the hearing is concluded and serve notice on the parties. The parties can seek a review of the case by filing an appeal in the municipal or superior court. The time period for doing so will be listed on the order, decision or award.

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[18] Lab. Code sec. 217

[19] Lab. Code secs. 217, 218

[20] *DLSE v. Lee*, 73 Cal. App. 4th 763 (1999)

[21] Lab. Code sec. 203.1

[22] Lab. Code sec. 98

[23] Lab. Code sec. 98(a)

[24] Lab. Code sec. 98(b)

An employer filing an appeal must post a bond with the court in the amount of the judgment rendered in the administrative hearing. If the appeal is unsuccessful, the court determines the costs and reasonable attorneys' fees incurred by the winning party and assesses those costs on the party filing the appeal. An employee is successful if the court awards an amount greater than zero.[25]

All awards made by the Labor Commissioner accrue interest on all due and unpaid wages.[26] The interest runs from the date the wages were due and payable until the wages are paid. This interest-bearing period includes the period in which the Labor Commissioner's decision is being appealed.

Enforcing Judgments

The law provides that once an order becomes final, a lien is created and the Labor Commissioner has the authority to record a certificate of lien on the employer's real property.

New 2016

To enforce a final judgment, the Labor Commissioner can also levy personal assets, including any credits, money or property belonging to the employer, including a successor employer. Specific procedures must be followed with regard to enforcing levies.[27]

In addition, the Labor Commissioner can issue a "stop order" — preventing the employer from continuing to conduct business in the state — when an employer fails to satisfy a final judgment for unpaid wages. The employer can continue to conduct business if a bond is posted; the amount of the bond varies based on the amount of the judgment the employer fails to pay.[28]

Failure to observe a stop order is a misdemeanor punishable by imprisonment (jail for up to 60 days) and/or a fine of up to $10,000.

Time Limits to File an Unpaid Wages Claim

Under the California Code of Civil Procedure, an employee has three years to file a lawsuit to enforce a statutory obligation.[29] In *Cortez v. Purolator Air Filtration Products Company*, the California Supreme Court extended the period of time in which a person can file a claim against an employer for failure to pay wages, including overtime.[30]

The California Supreme Court found that failure to pay earned wages, including overtime, constitutes an unfair business practice in violation of the California Unfair Competition law (UCL). Under the UCL, an employee can file a claim for unpaid wages up to four years after the alleged failure to pay. Employees can now collect up to four years of back wages under the UCL rather than three under the Labor Code.

In addition to seeking his/her unpaid wages, an employee can file a claim under the UCL on behalf of all other similarly situated employees of the employer, without having to file a class action lawsuit.

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[25] Lab. Code sec. 98.2

[26] Lab. Code sec. 98.1

[27] Code of Civil Procedure secs. 690.020-690.050; Labor Code sec. 96.8

[28] Lab. Code secs. 238, 238.1

[29] Civ. Code sec. 338

[30] *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163 (2000)

Private Attorneys General Act (PAGA) Claims

An individual aggrieved employee, acting on his/her own behalf and/or on behalf of other current and former employees, can bring a civil action to enforce provisions of the Labor Code if the government has not done so.[31] Lawsuits for most violations of posting, notice, agency reporting or filing requirements are excluded from private enforcement, except those requirements as they relate to payroll or workplace injury reporting.

An aggrieved employee can recover the applicable civil penalty on behalf of himself/herself and other current or former employees against whom one or more of the alleged violations was committed. Claims under the workers' compensation program are excluded.

Prior to filing a lawsuit, certain procedural steps must be followed for three broad categories of alleged Labor Code violations. These steps are designed to permit voluntary, early resolution of the employer violation with or without the intervention of a state agency.[32] In all three categories, the employee must first notify you and the appropriate state agency of the alleged violation. The notice must include the specific code provisions allegedly violated and the facts and arguments supporting the violation. All time limits run from the postmark date of this notice.

Category 1 Labor Code Violations

Category one specifies approximately 150 Labor Code sections that relate to:

- Setting and paying wages and salaries
- Regulating hours of work, meals and rest breaks
- Employing minors
- Employment under state and public works contracts
- Protection of whistleblowers
- Other specified sections regulating conditions of employment

An employee who believes that his/her rights under one of these sections have been violated must notify you and the Labor and Workforce Development Agency. Within 30 calendar days of the notice's postmark date, the agency must notify you and the employee if it does not intend to investigate the alleged violation.

- If the agency says it will not investigate or no notice is provided within 33 calendar days of the postmark date of the notice given by the employee, the employee can file a lawsuit.
- If the agency notifies you and the employee that it intends to investigate, the agency can then take up to 120 calendar days to complete its investigation.

The employee can file a lawsuit if:

- The agency decides not to cite you, in which case the agency must notify you and the employee within five working days of its decision.
- The agency fails to issue a citation against you within 158 calendar days.

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[31] Lab. Code secs. 2698-2699
[32] Lab. Code secs. 2699.3, 2699.5

Category 2 Labor Code Violations

Category two includes alleged violations of Labor Code Division 5, which regulates occupational health and safety, except sections 6310, 6311 and 6399.7, which are included in the first category. Before filing a lawsuit, an employee must notify you, the Division of Occupational Safety and Health (DOSH) and the Labor and Workforce Development Agency.

DOSH must then inspect or investigate as required by law and, if it issues a citation, no lawsuit can be filed. DOSH must notify you and the employee within 14 calendar days of certifying that the violation was corrected.

If DOSH does not issue a citation within its inspection deadline, the employee can challenge that decision in court. If the court directs DOSH to issue a citation, the employee cannot file another lawsuit. If DOSH fails to inspect or investigate, the employee can proceed as with other third category claims.

No private lawsuit can be filed if the employer and DOSH are already parties to an agreement for long-term abatement of conditions, or if they have previously entered into a consultation agreement about a condition at a particular worksite. However, a consultation agreement entered into after receiving an employee's notice does not prevent this process from continuing.

Category 3 Labor Code Violations

Category three covers all other alleged Labor Code violations and the failure of DOSH to inspect or investigate, in which case the following conditions apply:

- You have 33 calendar days after the postmark date of the notice to cure the alleged violation and notify the employee and the Labor and Workforce Development Agency of the actions taken. To "cure" the violation means to come into compliance and address the concerns of any aggrieved employee.
  - If you do not act in a timely manner to cure the alleged violation, the employee can file a lawsuit.
  - If the employee believes that your actions did not cure the violation, he/she can notify the agency, which can then take up to 17 days to investigate and grant you three additional business days to cure the violation.
- If the agency determines that the alleged violation has not been cured, the employee can file a lawsuit.
- If the agency determines that the alleged violation has been cured, but the employee disagrees, the employee can appeal the agency's decision.

New 2016

Effective October 2, 2015, employers have a limited opportunity to cure two types of violations relating to itemized wage statements, which are required by Labor Code section 226. Under AB 1506, employers will now be allowed 33 calendar days to cure a violation involving:

- Failure to provide employees with an itemized wage statement that contains the inclusive dates of the pay period; or
- Failure to provide employees with an itemized wage statement that contains the name and address of the legal entity.

This allows employers to cure unintentional errors.[33]

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[33] Labor Code section [illegible]

Under the law, violations of these wage statement requirements will only be considered cured if the employer shows that it has provided a fully compliant, itemized wage statement to each aggrieved employee for each pay period for the three-year period prior to the date that the employer received written notice of the alleged violation.

If the employer cannot cure the violation, then the employee is still able to file a civil action and obtain penalties, unpaid wages and attorneys' fees.[34]

The law limits the employer's right to cure, with respect to alleged violations of these provisions, to once in a 12-month period.[35]

Previously, there was no opportunity to cure these types of violations, and there was increasing litigation regarding technical violations that do not harm or injure employees.[36] For example, in *Elliot v. Spherion Pacific Work, LLC*, an employee brought a PAGA lawsuit because the employer used a truncated name on the wage statement "Spherion Pacific Work, LLC," instead of "Spherion Pacific Workforce, LLC" which was the entity's legal name. Although the court ultimately dismissed this claim, the employer still incurred unnecessary legal costs and attorney's fees to have it dismissed. This is only one example of numerous PAGA lawsuits that have been filed for technical violations.

Act promptly if you receive notice of a potential Labor Code violation. If the opportunity to cure is available, you will only have a short window of time. Consult with legal counsel.

PAGA Penalties and Awards

Any employee who prevails in any action is entitled to an award of reasonable attorneys' fees and costs. The employee can also pursue other remedies available under state or federal law either separately or concurrently with this action.

Where a specific provision of the Labor Code does not provide for a penalty, the court can assess one of the following penalties:

- At the time of the alleged violation, if the person does not employ one or more employees, the civil penalty is $500.
- At the time of the alleged violation, if the person employs one or more employees, the civil penalty is $100 for each aggrieved employee per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation.[37]

A court must review and approve penalties in connection with any settlement agreement. Courts have discretion to award lesser penalties to avoid unjust results.

Civil penalties recovered by aggrieved employees are divided, giving 75 percent to the Labor and Workforce Development Agency and 25 percent to the aggrieved employees. Where the claim is against an organization with no employees, the penalty is paid to the Labor and Workforce Development Agency.

Local Ordinance Enforcement

Several localities also have their own labor laws, such as those covering minimum wage. These are enforced by the local governments. For instance, in San Francisco, the San Francisco Office of Labor Standards Enforcement is the government arm charged with ensuring compliance.

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[34] Lab.Code sec. 2699(a)

[35] Lab. Code sec. 2699.3(c)(2)(B)(ii)

[36] *Elliot v. Spherion Pacific Work, LLC*, 572 F.Supp.2d 1169 (2008)

[37] Lab. Code sec. 2699

New 2016

Beginning in 2016, the state Labor Commissioner can also investigate local overtime and minimum wage laws. If the Labor Commissioner issues a citation, a local government entity cannot cite the employer for the same violation.[38] For more information, see "Minimum Wage" in Chapter 11, page 245.

Protection for Reporting Labor Code Violations

Labor Code section 98.6 protects employees from discrimination or retaliation for exercising their rights under the Labor Code, such as complaining of wage theft. Protected employee conduct includes:

- Bringing a complaint or claim relating to violations of his/her rights under the Labor Code
- Giving the agency or the employer a notice alleging a violation
- Filing a lawsuit

The protection extends to employees who testify or are about to testify in connection with a notice or claim. The protection applies whether the claim is filed on the individual's own behalf or on others' behalf.[39]

Labor Code section 98.6 specifically protects an employee who brings a written or oral complaint that he/she is owed unpaid wages, but other types of complaints about labor code violations are also protected.

The Labor Code provides safeguards to employees who bring such complaints/claims against adverse actions involving:

- Employment
- Termination or threat of termination
- Demotion
- Retaliation
- Suspension
- Terms and conditions of employment
- Training opportunities

An employee who is discriminated or retaliated against for exercising his/her rights under the Labor Code is entitled to reinstatement and reimbursement for lost wages and work benefits. An employer who willfully fails to hire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion is guilty of a misdemeanor.

An employer who violates Labor Code section 98.6 is also liable for a civil penalty of up to $10,000 per employee for each violation, in addition to any other available remedies.

New 2016

Beginning January 1, 2016, employers are also prohibited from retaliating against an employee because the employee's *family member* engaged in, or is perceived to have engaged in, protected conduct.[40]

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[38] Lab. Code sec. 1197.1

[39] Lab. Code sec. 98.6.

[40] Lab. Code sec. 98.6(e)

The law was also amended to not only hold the employer liable for a violation of this anti-retaliation law, but also to create liability for:[41]

- A "client employer" — a specific definition related to companies who contract for labor, such as companies that use staffing agencies. For more information, see "Contingent Workers" in Chapter 6, page 87.
- Any employer on a multiemployer worksite that exposed workers to hazardous conditions, created the hazard, was responsible for the health and safety of the worksite and/or was responsible for correcting the hazard (see Labor Code section 6400).

For more information, see "Whistleblower Protections" in Chapter 26, page 707.

Discussion of Wages or Working Conditions

Several laws protect employees' discussions about wages and working conditions: Labor Code section 232, California's Fair Pay Act and the National Labor Relations Act.

Under Labor Code section 232, you cannot:

- Prohibit employees from discussing their wages or working conditions.
- Require an employee to sign any document denying him/her the right to disclose the amount of his/her wages or working conditions.
- Terminate, formally discipline or otherwise discriminate against an employee for disclosing his/her wages or working conditions.[42]

This law is not intended to permit employees to disclose your proprietary information, trade secret information or other legally protected information without your consent.

In *Grant-Burton v. Covenant Care, Inc.*, a California Court of Appeal found that an employer violated the Labor Code when it fired an employee for engaging in a discussion of bonus payments with co-workers. At a meeting with co-workers, she discussed the fact that some received bonuses while others did not. Six days later, she was fired. The termination papers indicated the termination was for violating organization rules. A company investigation concluded that the bonus discussion was one reason for her termination.

The Court of Appeal said she had the right to a trial on her claim for an unlawful termination. The claim was based directly on California Labor Code section 232, which the court interpreted to include discussion of bonuses as well as wages.[43]

New 2016

In addition, under California's Fair Pay Act, employers cannot prohibit employees from:

- Disclosing their own wages
- Discussing the wages of others
- Inquiring about another employee's wages
- Aiding or encouraging employees to exercise their right to equal pay

This law does not create an obligation to disclose wages.[44]

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[41] Lab. Code sec. 98.6(f)

[42] Lab. Code sec. 232

[43] *Grant-Burton v. Covenant Care, Inc.*, 99 Cal. App. 4th 1361 (2002)

[44] Lab. Code sec. 1197.5

The Fair Pay Act was passed in an effort by the Legislature to narrow any gender wage gap in California. According to the legislative intent, pay secrecy contributes to that gap. For more information, see Chapter 26, "Gender Wage Equality — Fair Pay Act.

The National Labor Relations Act (NLRA) also provides employees with the right to discuss the terms and conditions of their employment with other employees. For more information, see "Protected Concerted Activity in Union and Non-Union Workplaces" in Chapter 31, page 950.

Fair Labor Standards Act (FLSA)

The federal Fair Labor Standards Act (FLSA) includes provisions defining minimum wage and permissible subminimum wage levels, maximum hours of work and overtime pay, restrictions on employment of minors and categories of exempt employees.

Issues discussed in the FLSA are also the subject of California law which, in most cases, contains more favorable conditions for employees. Where both state and federal law govern the same issue, you should follow the law more favorable to the employee.

In June of 2015, the U.S. Department of Labor submitted proposed revisions to the federal overtime rules, including revising the federal minimum salary threshold. These proposed rules could potentially impact California employers; the proposed federal overtime rules would contain a minimum salary threshold for exempt status that is higher than California's requirement. It is unlikely that any rules will be finalized before the spring of 2016.

The Wage and Hour Division of the U.S. Department of Labor administers and enforces the FLSA. Special rules apply to state and local government employment involving fire protection and law enforcement activities, volunteer services and compensatory time off in lieu of cash overtime pay.

In many instances, California employers must comply with more stringent standards.

Who Is Covered By the FLSA?

The FLSA covers a majority of California businesses. An entire enterprise, or business, may be covered if it meets certain tests. If the FLSA covers an enterprise, it covers all of the enterprise's employees. However, even if an enterprise does not meet those tests, some of its employees may fall under the FLSA through individual coverage.

When neither enterprise coverage nor individual coverage apply, you are not covered by the FLSA provisions and should look to California law only.

FLSA Enterprise Coverage

The FLSA covers all employees of enterprises engaged in interstate commerce, producing goods for interstate commerce; or handling, selling or otherwise working on goods or materials moved in or produced for commerce by any person.

Employees who work for certain enterprises are covered by the FLSA. These enterprises, which must have at least two employees, are:

- Enterprises that have an annual dollar volume of sales or business done of at least $500,000.
- Hospitals, businesses providing medical or nursing care for residents, schools and preschools and government agencies

FLSA Individual Coverage

Even when there is no enterprise coverage, employees are protected by the FLSA if their work regularly involves them in commerce between states, or interstate commerce. The FLSA covers individual employees who are engaged in commerce or in the production of goods for commerce.

Examples of employees who are involved in interstate commerce include those who:

- Produce goods that will be sent out of state; for example, an employee assembling components in a factory or a secretary typing letters in an office
- Regularly make telephone calls to people located in other states
- Handle records of interstate transactions
- Travel to other states on their jobs
- Perform janitorial work in buildings where goods are produced for shipment outside California

Domestic service employees, such as day workers, housekeepers, chauffeurs, cooks or full-time baby-sitters fall under the FLSA if they:

- Receive at least $50 in cash wages in a calendar quarter from their employers
- Work a total of more than eight hours a week for one or more employers

See the *FLSA Worksheet - Determining Coverage* to help you determine if the FLSA covers your business.

FLSA Worksheet - Determining Coverage

FLSA Wage and Hour Provisions

The FLSA includes provisions defining minimum wage and permissible subminimum wage levels, maximum hours of work and overtime pay and restrictions on employment of minors and categories of exempt employees. These issues also fall under California law which, in most cases, contains more favorable conditions for employees. Where both state and federal law govern the same issue, the law most favorable to the employee prevails. For more information, see the following chapters, which guide you to the law you must comply with in California.

- Minimum wage and other compensation issues are covered in Chapter 11, “Wages, Salaries and Other Compensation.”
- Hours of work are covered in Chapter 12, “Hours of Work and Recording Time Worked.”
- Overtime obligations, computation and payment are covered in Chapter 13, “Overtime.”
- Classification of employees as exempt or nonexempt from overtime is covered in Chapter 4, “Exempt and Nonexempt.”

FLSA Record Retention Requirements

The FLSA requires you to keep records on wages, hours and other items as specified in Department of Labor record keeping regulations. Most of the information is typically already maintained by employers in ordinary business practice and in compliance with other laws and regulations. You need not keep the records in any particular form. You need not use time clocks.

For an employee covered by both minimum wage and overtime pay provisions (nonexempt employees), you must keep the following records:[45]

- Personal information, including employee's name, home address, occupation, sex and, if less than 19 years of age, birth date
- Hour and day when workweek begins
- Total hours worked each workday and each workweek
- Total daily or weekly straight-time earnings
- Regular hourly pay rate for any week when overtime is worked
- Total overtime pay for the workweek
- Deductions from or additions to wages
- Total wages paid each pay period
- Date of payment and pay period covered

Special information is required for:[46]

- Homeworkers
- Employees working under uncommon pay arrangements
- Employees to whom lodging or other facilities are furnished
- Employees receiving remedial education

California law requires similar information for both exempt employees and nonexempt employees.

FLSA Enforcement

Investigators stationed across the United States carry out the Wage and Hour Division's enforcement of the FLSA. They conduct investigations and gather data on wages, hours and other employment conditions or practices to determine FLSA compliance. If they find violations, the investigators may also recommend changes in employment practices to bring an employer into compliance with the FLSA.

An employer, including individual owners, found guilty of violating the minimum wage and maximum hours provisions may be required to pay the amount due to employees plus an equal amount in liquidated damages.[47]

An employer, including individual owners, found guilty of child labor violations may be subject to a civil penalty not to exceed $10,000 for each employee who was the subject of a violation. Any person who repeatedly or willfully violates section six or seven of the FLSA may be subject to a civil penalty not to exceed $1,000 for each violation.[48]

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[45] 29 CFR 516.2
[46] 29 CFR 516.3 - 516.34
[47] 29 U.S.C. 216(a)
[48] 29 U.S.C. 216(e)

It is a violation of the FLSA to fire or in any manner discriminate against an employee for filing a complaint or participating in a legal proceeding under the FLSA.[49] The law provides for payment of back pay and damages in these cases.[50]

Business owners found guilty of willful violations may be prosecuted criminally and subjected to fines of up to $10,000. A second willful violation may result in up to six months' imprisonment.[51]

The FLSA prohibits shipping goods in interstate commerce that were produced in violation of the minimum wage, overtime pay, child labor or special minimum wage provisions.[52]

Further Information

For more information on the FLSA, go to the U.S. Department of Labor Wage and Hour Division's website at www.dol.gov/whd/flsa/index.htm. For more information on California Wage Orders, go to the California Industrial Welfare Commission's website at www.dir.ca.gov/iwc/iwc.html. For more information on licensing and registration requirements, visit the Division of Labor Standards Enforcement website at www.dir.ca.gov/DLSE/dlse.html.

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49. 29 U.S.C. 215(a)(3)
50. 29 U.S.C. 216(a)
51. 29 U.S.C. 216(a)
52. 29 U.S.C. 215(a)

Chapter 11

Wages, Salaries and Other Compensation

This chapter begins with a comprehensive discussion of California's minimum standards for straight-time hourly wages, incentive pay and special pay arrangements as required by the Industrial Welfare Commission (IWC) Wage Orders.

The issue of overtime is discussed in Chapter 13, "Overtime," the issue of hours worked is discussed in Chapter 12, "Hours of Work and Recording Time Worked," the issue of exempt versus nonexempt status is discussed in Chapter 4, "Exempt and Nonexempt" and the issue of gender pay equality is discussed in Chapter 26, "Employment Discrimination."

Paying employees the correct amount, timely payment of wages and the way in which payment is made are equally important. This chapter discusses these issues, including how and when you must pay terminating employees and when you can and cannot make deductions from employee wages.

Finally, this chapter describes rules about tools, uniforms and equipment, work facilities and industry specific wage laws covering domestic services, garment industries and agriculture.

Wage and Hour Law: Definitions of Terms

This section defines some of the key terms used in wage and hour law:

- Employee
- Employer
- Full time and part time
- Student
- Wages

Employee

An employee is any person rendering actual service in any business for an employer, whether gratuitously or for wages.[1] Certain volunteers, independent contractors and participants in a joint enterprise are not considered employees for certain purposes, such as workers' compensation coverage.[2]

Employer

An employer means every person engaged in any business or enterprise in California, who has one or more people in service.[3] An employer can be a person, association, organization, partnership, business trust, limited liability company or corporation.[4]

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[1] [illegible]

[2] [illegible]

[3] [illegible]

[4] [illegible]

Full Time and Part Time

There is not a standard definition of "full time" or "part time." Generally, you are free to determine the number of hours required for an employee to be considered full time versus part time. Some employers require employees to work 40 hours per week to be considered full time. Others designate as full time those employees who work as little as 24 or 32 hours. As a matter of convenience, you can set the number of work hours required to be a full-time employee as the same number of hours your health insurer requires an employee to work to be eligible for coverage.

You can offer different benefits, such as vacation, or levels of benefits to full-time employees than you offer to part-time employees. Providing more benefits to full-time employees does not by itself create liability for illegal discrimination.

If nearly all of your part-time employees who are *denied* benefits fall into one protected category and nearly all of your full-time employees *with* benefits do not, you may create the appearance of illegal discrimination.

Example: All of XYZ Corporation's full-time employees are less than 40 years of age and receive full benefits, but nearly all part-time employees are more than 40 years of age and receive no benefits. XYZ Corporation may not intend to discriminate on the basis of age, but the company should consider that the benefit arrangements for its workforce create that appearance and could invite costly litigation.

Although there is no set number of hours an employee must work to be considered full time, the number of hours worked per week can affect whether an employer is subject to certain laws and whether the employee is eligible for certain mandatory benefits. For instance, the Affordable Care Act covers full-time employees working an average of 30 or more hours per week. The Family and Medical Leave Act covers any employee who worked at least 1,250 hours in the 12 months before taking leave. Be aware of the effect reducing hours has on mandatory benefits.

Which Employees are Covered?	
Affordable Care Act	Only full-time employees working an average of 30 or more hours per week
Family and Medical Leave Act/ California Family Rights Act	Full-time and part-time employees if they worked at least 1,250 hours in the 12 months before taking leave
Pregnancy Disability Leave	Full-time and part-time employees
Fair Employment Housing Act/ Americans with Disabilities Act	Full-time and part-time employees
Paid Sick Leave	Full-time and part-time employees

Consult your benefits adviser to determine if your health insurance policy contains different definitions of full time or part time, and for guidance on the particular definition of "full-time employee" under the Affordable Care Act (ACA). For more information on the ACA, see "Federal Health Care Reform Overview" in Chapter 17, page 423.

Student

A "student" is a person who is enrolled in high school or college or who was so enrolled during the most recently completed semester. The student must have attended school at least nine hours per week and must be pursuing a course of study with the goal of receiving a diploma or degree.

Students who perform work in the course of their studies as part of a curriculum are not employees if they receive no payment for their work and no credit toward their school fees.[5] Employers sometimes like to hire students as unpaid "interns." Use caution if you're considering adding unpaid interns to your workforce. For more information, see "Interns" in Chapter 6, page 110.

Wages

A "wage" is money received by an employee for any labor performed, whether the amount is fixed or determined by the standard of time, task, piece, commission or by other methods of calculation.[6]

Minimum Wage

California's minimum wage is $10.00 per hour and the federal minimum wage is $7.25 per hour. When state and federal law differ, you must comply with the more restrictive requirement. California state minimum wage is higher, so that is the rate that you must pay employees in California.

Legislation passed in 2013 raised California's minimum wage in two steps, first to $9 an hour in July of 2014 and then to **$10 per hour**, effective **January 1, 2016**.

Employers should be mindful of the effect of the minimum wage increase on exempt/nonexempt classifications and ensure that employees meet the salary basis test for the particular exemption claimed.

In 2016, all work that qualifies for overtime must be paid at $15.00 per hour (time and one-half) or $20.00 per hour (double-time). For more information on overtime, see Chapter 13, "Overtime."

The minimum salary requirement for exempt employees is based on the state minimum wage, not the minimum wage rate that may be applied by any local ordinance. When the state minimum wage increases, employers will need to examine their exempt nonexempt classifications. For more information, see "Minimum Salary for Exempt Employees" in Chapter 4, page 49.

For 2016, the minimum wage for workers on federal construction and service contracts is $10.15 an hour. For more information, see "Federal Prevailing Wage Law" on page 292.

Local Minimum Wage Ordinances

Some cities and counties in California have adopted their own local minimum wage rates that are separate from the state rate. This is part of a growing trend.

Keep in mind that the minimum salary requirement for exempt employees is based on the current state minimum wage, not any applicable local minimum wage.

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[5] DLSE *Enforcement Policies and Interpretations Manual* sec. 43.6.8; DLSE Opinion Letters 1993.10.21, 1993.01.07-1, 1[illegible]

[6] Lab. Code sec. 200

Cities in California continue to pass local ordinances relating to the minimum wage. Eligibility rules may vary from city to city. The minimum wages rates in these cities may change at any time; employers should closely monitor them. Check with your local city government as to whether any local minimum wage ordinance might apply to your workforce.

City	Minimum Wage Rate	Posting Requirement	Link to City Website
Berkeley	$11.00/hour (12.53/hour effective October 1, 2016)	Yes	Minimum Wage Ordinance (MWO) http://www.cityofberkeley.info/mwo/
Emeryville	$12.25/hour for businesses with 55 or fewer employees; ($13/hour beginning July 1, 2016) $14.44/hour for businesses with more than 55 employees; ($14.82/hour est. beginning July 1, 2016)	Yes	City of Emeryville http://www.ci.emeryville.ca.us/1024/Minimum-Wage-Ordinance
Long Beach*	$13.80/hour	No**	Office of the City Clerk http://www.longbeach.gov/cityclerk/
Los Angeles	$10.50/hour (effective July 1, 2016 for employers with 26 or more employees; requirement for smaller employers delayed until 2017) $15.37/hour*	No	Ordinance No. 18612 http://clkrep.lacity.org/onlinedocs/2014/14-1371_ord_183612_07-19-15.pdf Ordinance No. 183241 (hotel workers) http://clkrep.lacity.org/onlinedocs/2014/14-0223_ord_183241.pdf
Mountain View	$11.00/hour	Yes	City of Mountain View http://www.mountainview.gov/depts/comdev/economicdev/city_minimum_wage.asp
Oakland	$12.55/hour	Yes	Minimum Wage Ordinance http://www2.oaklandnet.com/Government/o/CityAdministration/d/MinimumWage/OAK051451
Richmond	$11.52/hour	Yes	Richmond's Minimum Wage Ordinance http://www.ci.richmond.ca.us/index.aspx?nid=2615

City	**Minimum Wage Rate**	**Posting Requirement**	**Link to City Website**
San Francisco	$12.25/hour ($13.00/hour effective July 1, 2016)	Yes	Minimum Wage Ordinance (MWO) http://sfgsa.org/index.aspx?page=411
San José	$10.30/hour	Yes	Minimum Wage Ordinance http://www.sanjoseca.gov/index.aspx?nid=3491
Sunnyvale	$10.30/hour	Yes	Minimum Wage in Sunnyvale http://sunnyvale.ca.gov/DoingBusiness/EconomicDevelopment/MinimumWage.aspx

*Applies to hotel workers/**Requires written notification of rate adjustments

Local Minimum Wage and Paid Sick Leave Ordinances (printable version of this chart)

CalChamber offers San Francisco and San José-specific employment law posters. These contain the minimum wage notices. They are available from the CalChamber store.

Local agencies generally have the authority to enforce their minimum wage laws. For instance, in San Francisco, the Office of Labor Standards Enforcement enforces the city's minimum wage ordinance.

New 2016

Beginning January 1, 2016, the state Labor Commissioner also has authority to investigate and enforce local minimum wage and overtime provisions. The Labor Commissioner can issue citations and penalties against employers for violation of local minimum wage or overtime laws, except when a local government entity has already cited the employer for the same violation. If the Labor Commissioner issues a citation, the local entity cannot cite the employer for the same violation.

Living Wage Versus Minimum Wage

Living wage ordinances generally require employers who contract with a city or county to pay their employees a rate higher than the minimum wage work done pursuant to the contract. This is different than a minimum wage that would apply to all employers regardless of the type of contract involved. Often the ordinances also require additional contributions toward health benefits.

The following cities and counties have adopted some version of a living wage ordinance:

Cities	**Counties**	**Towns**
Albany	Los Angeles	Fairfax
Berkeley	Marin	
Davis	San Francisco	
Emeryville	Santa Clara	
Hayward	Santa Cruz	
Los Angeles	Ventura	
Oakland		
Oxnard		
Pasadena		
Petaluma		

Cities	Counties	Towns
Port Hueneme		
Richmond		
Sacramento		
San Diego		
San Fernando		
San Francisco		
San Jose		
San Leandro		
Santa Barbara		
Santa Cruz		
Santa Monica		
Sebastopol		
Sonoma		
Ventura		
Watsonville		
West Hollywood		

The Port of Oakland and Port of Los Angeles have also adopted living wage ordinances.

Minimum Wage "Averaging" Prohibited

California Wage Orders provide that every employee must receive no less than the state minimum wage per hour for all hours worked. In contrast, the federal Fair Labor Standards Act (FLSA) requires payment of minimum wage to employees who work in any workweek.

The difference between federal and state laws resulted in a substantial award against a California employer for minimum wage violations. In *Armenta v. Osmose, Inc.*, a California Court of Appeal ruled that the differences between California and federal minimum wage prohibits employers from averaging the hourly rate to determine compliance with state minimum wage law.[7]

California law provides greater employee protection by mandating that each hour of work be regarded independently to determine if the employer met its obligation to pay the agreed upon wage.

Fixed Salaries and Nonexempt Employees

Some employers have fixed salary arrangements with nonexempt employees (often called mutual wage agreements). For example, an employer may set a fixed weekly wage that includes payment for a certain number of hours of work per day and per week. Labor Code section 515(d)(2) states that payment of a fixed salary to a nonexempt employee will be deemed to be payment only for the employee's regular, non-overtime hours, notwithstanding any private agreement to the contrary.

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[7] *Armenta v. Osmose, Inc.*, 135 Cal.App.4th 314 (2005)

Consult legal counsel before entering into a fixed salary agreement. Fixed salary agreements pose liability risks and are difficult to administer. Employers still need to keep track of hours worked and overtime regardless of any private agreement.

Subminimum Wages

Both federal and state law contain provisions for paying employees less than minimum wage. However, the laws conflict. You must follow the most restrictive rule.

The IWC Wage Orders permit you to pay learners 85 percent of the minimum wage, rounded to the nearest nickel, but not less than $8.50 per hour (based on the January 1, 2016, minimum wage). State law allows for the subminimum wage for the first 160 work hours, after which the employee must be paid at least minimum wage.[8] "Learners" are employees who have no previous similar or related experience in the occupation.

Federal law allows payment of a subminimum wage — called an opportunity wage — for employees younger than 20 years of age, for their first 90 consecutive calendar days of employment. You cannot displace employees or reduce employees' hours, wages or employment benefits to hire a youth at subminimum wage.[9] The following table summarizes subminimum wage laws. The most restrictive rules are in bold and must be followed in California.

	Federal	**State**
Hourly rate of pay	$4.25	**$8.50**
Age requirements	**Must be younger than 20**	None
Length of time lower payments can be made	First 90 consecutive calendar days of employment	**First 160 work hours**
Other restrictions	Cannot displace others or reduce hours, wages or benefits to hire a youth	Must have no previous similar related experience in the occupation

Exceptions to the Minimum Wage

Other exceptions to the minimum wage include:

- You can obtain licenses from the IWC to pay less than the minimum wage to learners and apprentices or to people whose productivity is affected by certain mental or physical disabilities.[10]
- Organized camp counselors, program counselors and student employees are exempt from the minimum wage if they receive a salary of at least 85 percent of the minimum wage for a 40-hour week regardless of the number of hours per week they work at the organized camp. If they work fewer than 40 hours per week, they must be paid at least 85 percent of the minimum wage for each hour worked. The organized camp can, with the employee's written permission, deduct a fair market value of meals and lodging from employee salaries.[11]
- Any individual who is a parent, spouse, child or legally adopted child of the employer is not covered by the minimum wage laws.[12]

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[8] IWC Wage Orders sec. 4

[9] 29 U.S.C. 206(g)

[10] Lab. Code secs. 1191-93

[11] Lab. Code sec. 1182.4

[12] IWC Minimum Wage Order

- Outside salespeople are not covered by the minimum wage law. For more information, see "Outside Salesperson Exemption" on page 65.[13]
- Some executive, administrative and professional employees may be exempt. For more information see Chapter 4, "Exempt and Nonexempt."

Piece Rate Pay

Piece rate pay is based on completing a particular task or making a particular piece of goods.[14] It is a method of payment based on units of production, instead of actual time worked.

Many employers pay piece rate to establish an incentive system. The agriculture, manufacturing, automotive-repair and truck-driving industries commonly use the piece rate compensation system, but other industries use it as well. For example, a factory worker might be paid per item made on the assembly line; a mechanic might be paid a set amount per brake job or tune-up; a carpet layer might be paid per yard of carpet laid; or a nurse might be paid per procedure.

All requirements that apply to hourly employees also apply to piece rate employees.

At the end of the payroll period, the employee must receive at least minimum wage for each hour worked, despite slow production hours or slow production days.[15] Special rules also apply to compensating for rest and recovery periods and nonproductive time.

Calculating Compensation for Piece Rate Workers

In general, the piece rate is based upon a set figure paid for completing a particular piece of work or task or for making a product. The piece rate that is paid to the employee includes time spent producing the particular product or completing the particular task.

The question of how to compensate piece rate employees for other work time — time not spent producing the product or completing the task — has recently been addressed, first by California courts and then by the state legislature.

Overview

In 2013, California appellate courts issued two important rulings on the piece rate compensation system involving how to compensate piece rate workers for:

- Time spent on non-piece rate work[16]
- Employee rest breaks[17]

However, these decisions were not California Supreme Court decisions, and this area of the law was still unsettled. In the meantime, class action litigation regarding proper piece rate compensation began to rise.

New 2016

In 2015, the state legislature stepped in to specifically address the issue of compensating piece rate workers for non-piece rate time and to expand on existing court decisions. The legislature passed AB 1513, adding section 226.2 to the Labor Code.

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[13] IWC Minimum Wage Order
[14] DLSE Enforcement Policies and Interpretations Manual sec. 2.5.1
[15] DLSE Enforcement Policies and Interpretations Manual sec. 4[illegible]
[16] Gonzalez v. Downtown LA Motors, LP, 215 Cal. App. 4th 36 (2013)
[17] Bluford v. Safeway Stores Inc., 216 Cal. App. 4th 864 (2013)

The law, effective January 1, 2016, makes significant changes for California employers who have piece-rate employees, and generally changes the rules governing payment of these workers. In general, the new law:

- Requires that piece rate employees to be compensated for rest and recovery periods and all other periods of "other nonproductive time" **separately** from any piece rate pay and at specified minimum rates;
- Sets forth specific wage statement requirements;
- Includes a limited "affirmative defense" that allows employers who meet specified conditions to come into compliance for past underpayments without facing further liability;
- Specifically states that it does not limit or change minimum wage or overtime compensation requirements, and does not change the obligation to compensate employees for all hours worked under any state law or local ordinance.

If your company uses a piece rate compensation system, you should consult with legal counsel as to what modifications need to be made to your current compensation system in light of the new legislation's impact on piece rate compensation. Employers should also ensure that nonexempt piece rate employees are recording all hours worked — including meal and rest breaks.

The following sections provide a specific discussion of the legislation.

Compensation for Rest and Recovery Period

Employers must separately compensate employees for rest and recovery periods at a specific hourly rate.[18] You must compensate workers for rest and recovery periods using whichever of the following rates is higher:

- **The applicable minimum wage** (whether local, state or federal — whichever applicable rate is highest); or
- The employee's **average hourly rate**:
  - Average hourly rate is determined by dividing the total compensation for the workweek (excluding pay for rest and recovery periods and any overtime pay) by the total hours worked during the workweek (excluding rest and recovery periods).

Since the employer must pay the higher of the two amounts, you must calculate the average hourly rate **per pay period** and compare it to the applicable minimum wage to determine which is higher.

Example: An employee's total piece rate compensation is $1,000 and the employee worked 50 hours. The average hourly rate is $20. Rest and recovery periods are paid at this rate, as it is higher than the minimum wage.

Special Rule for Piece Rate Employees Paid Semi-Monthly

For companies who pay employees semi-monthly, a different requirement applies in order to allow employers time to calculate the average hourly rate — since the pay period may close before the average hourly rate for the workweek can be determined. For instance, the pay period may close on Wednesday the 15th, but the workweek does not end until Saturday. An employee who is paid semi-monthly must be paid at least the minimum wage for rest and recovery time in that payroll period. If, after calculating the average hourly rate, the employer determines that the employee is owed additional pay, that extra amount must be paid in the next paycheck.[19]

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[18] Lab. Code sec. 226.2 (a)(3)

Extension for Certain Employers

Some employers will be given an additional four months — until April 30, 2016 — to program their payroll systems to comply with the new calculation requirement for rest and recovery periods.[20]

Only employers who meet all of the requirements below are eligible for this additional time:

- The employer was acquired by another legal entity on or after July 1, 2015 and before October 1, 2015;
- The employer employed at least 4,700 employees in this state at the time of the acquisition;
- The employer employed at least 17,700 employees nationwide at the time of the acquisition; and
- The employer was a publicly traded company on a national securities exchange at the time of the acquisition.

In order to take advantage of this extension, the employer must:

- Pay the piece rate employees at least the applicable minimum wage for all rest and recovery periods from January 1, 2016 to April 30, 2016; and
- Retroactively pay any difference between the minimum wage and the average hourly rate owed, plus interest for periods from January 1 2016 through April 1, 2016. The retroactive payments must be made no later than April 30, 2016.

Compensation for Nonproductive Time

New 2016

Labor Code section 226.2 also requires employers to pay employees separately for "other nonproductive time."

"Nonproductive time" is specifically defined by the law as "time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis."[21] Nonproductive time may include time spent waiting for work, conducting pre-work inspections or attending meetings.

For example, in *Gonzalez v. Downtown LA Motors LP*, the court required separate compensation for the time auto technicians spent waiting for repair work and engaged in nonrepair tasks, such as cleaning, attending meetings, reviewing service bulletins, obtaining parts and traveling to other locations to pick up or return cars.[22]

You may find it difficult to determine which activities are not directly related to the piece rate work and must be compensated separately. Consult legal counsel with any questions regarding what constitutes nonproductive time.

Employers are required to pay piece rate workers for nonproductive time at an hourly rate that is at least the applicable minimum wage (whether local, state or federal).

If, in addition to piece rate wages, you already pay an hourly rate that is at or above the applicable minimum wage *for all hours worked* you will be considered in compliance with the statute. Further, if you choose to pay a base hourly rate for all hours worked, you are not required to specify the total hours of nonproductive time on the wage statement. For more information, see “Wage Statement Requirements” on page 253.

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[19] Lab. Code sec. 226.2 (a)(3)(B)

[20] Lab. Code sec. 226.2 (a)(3)(C)

[21] Lab. Code sec. 226.2

[22] *Gonzalez v. Downtown LA Motors LP*, 215 Cal.App.4th 36 (2013)

You can determine the amount of time spent on other nonproductive work either by actual records or through your “reasonable estimates” for a particular employee or group of employees.

It is unclear exactly how an employer could make or defend a “reasonable estimate” of the amount of time spent on nonproductive work. Absent further guidance, documentation of time spent on nonproductive work is a best practice.

If you make a good faith error in determining the total or estimated amount of other nonproductive time worked during the pay period, you must pay for the other nonproductive time. However, you will not be liable for any statutory or civil penalties —based solely on that good faith error — as long as you meet all of the following requirements:[23]

- Provide the required wage statement information;
- Pay the worker the compensation due for the amount of nonproductive time you determined; and
- The total compensation paid for any day in the pay period is at least the minimum wage due for all hours worked and any required overtime.

If you believe you have made a good faith error in your calculation, consult your legal counsel or human resources advisor as to how to ensure that you have properly corrected the error.

Wage Statement Requirements

At the time wages are paid, employers must provide each employee with a written itemized wage statement that contains specific information. Generally this information is found on the pay stub. For piece rate workers, the itemized wage statement must include the number of piece rate units earned and applicable piece rate.

For more information, see “Itemized Wage Statement” on page 285.

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Beginning January 1, 2016, wage statements given to piece rate employees must also contain the following specific information for each pay period:[24]

- The total hours of compensable rest and recovery periods, the rate of compensation for those periods and the gross wages paid; and
- The total hours of nonproductive time, the rate of compensation for nonproductive time, and the gross wages paid for such time.
  - You are not required to put this information on the pay stub if you pay for nonproductive time by paying a base hourly rate of at least the minimum wage for all hours worked, in addition to the piece rate. For more information, see “Compensation for Nonproductive Time” on page 252.

Affirmative Defense

In the wake of recent California court decisions, there have been a number of class action lawsuits filed by piece rate workers claiming they were not properly compensated.

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[23] Lab. Code sec. 226.2(a)(6)

[24] Lab. Code sec. 226.2 (a)(2)

New 2016

Labor Code section 226.2 contains a limited affirmative defense for employers that, in the past, may not have properly paid piece rate workers for rest and recovery periods or other nonproductive time and that face liability. If specific requirements are met, the affirmative defense allows employers relief from pending litigation or the prospect of future liability for failure to properly compensate piece rate workers during time periods on or before December 31, 2015.[25]

Employers who want to take advantage of the affirmative defense will need to meet the statutory requirements by **December 15, 2016**.

The affirmative defense contains specific, detailed requirements. Employers that are concerned about past compensation of piece rate workers should consult with legal counsel regarding the availability of this defense.

Generally, an employer can assert an affirmative defense against claims for wages, damages and penalties for failure to properly pay for rest and recovery periods and other nonproductive time, if the employer:

- Pays each of its employees for previously uncompensated or undercompensated rest and recovery and other nonproductive time, plus interest, for the period from July 1, 2012-December 31, 2015; and
- Meets specific notification and recordkeeping requirements detailed in Labor Code section 226.2(b). The requirements are detailed and complex and are outside the scope of this chapter. Employers that face claims of unpaid compensation to piece rate workers are again advised to consult with legal counsel.

The safe harbor provision does not apply to a claim that employees were not provided with rest breaks. It also does not apply to claims occurring after January 1, 2016.

Repeated Work

You can require employees to redo their work without paying them additional piece rate, as long as you pay the minimum wage for each hour worked in the payroll period. For example, when a hair stylist is required to redo a perm, he/she is not entitled to a second piece rate. However, he/she is guaranteed minimum wage for the total hours worked in the payroll period, including the time spent redoing the perm. The same principles apply to flat rate mechanics and to other piece rate employees. Be sure to notify employees of the reduced rate of pay before the redo work is performed.

Overtime Calculation for Piece Rate Employees

Piece rate employees are entitled to premium pay for overtime hours. However, the overtime calculation is different than for hourly employees.[26] First you must calculate the employee's regular rate.

To calculate the regular rate for piece workers, straight-time wages are divided by actual hours worked, even if it's more than 40 hours. This differs from the regular rate calculation for salaried or hourly employees, for which the regular rate is determined by dividing by the actual hours worked **but never more than 40**. For more information, see Chapter 13, "Overtime."

Once you have calculated the regular rate for your piece workers, you can then determine overtime pay.

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[25] Lab. Code sec. 226.2 (b)

[26] DLSE *Enforcement Policies and Interpretations Manual* sec. 49.2.1.6

Incentive Pay

In some businesses, tips and gratuities make up part of employees' pay in addition to wages. In other businesses, piece rates, commissions and bonuses make up part of employees' pay. You must understand the distinction between these forms of pay. The distinction is important because certain wage and hour laws contain exceptions for commissioned employees (for example, timing of wage payments, final wages and exemptions from overtime) and determine whether and when payment of these types of wages is due.

Tips and Gratuities

Food servers, valets and others performing services often receive tips or gratuities. Tips and gratuities are subject to income tax. Tips and gratuities are the sole property of the employee to whom they were given. You cannot collect or receive any gratuity left for the employee. You cannot deduct from the employee's wages any fees and/or costs to the employer associated with the use of a credit card by the customer. You cannot credit the employee's tips against his/her wages to satisfy wage requirements.[27]

An employer's agent is prohibited from collecting, taking or receiving any gratuity given to an employee by a patron. The law defines an "agent" as every person other than the employer who has the authority to hire or discharge any employee or supervise, direct or control the employees' actions.[28]

Tip Pooling

The restaurant and hospitality industries commonly create tip pools for employees. In a tip pool, employees who receive tips share those tips with other employees. Tip pools spread the risk of low-tipping patrons among all tipped employees. Tip pools also create a way for tips to be shared with employees considered deserving of tips, but not directly tipped by customers, such as table bussers.

California law does not specifically prohibit involuntary tip pooling, in which you require employees to pool all or a portion of their tips and then share those tips with other employees. However, the employer or any "agents" of the employer cannot share in the tips.[29] For example, tip sharing with a floor manager is unlawful.[30]

In *Lu v. Hawaiian Gardens Casino, Inc.*, an employee sued his employer, claiming that the employer's tip pooling policy violated California Labor Code section 351. The California Supreme Court heard the case in order to resolve a split among the lower courts and concluded that Labor Code section 351 does not give employees a private right of action to sue in court. So, while it is illegal for you to take gratuities that customers leave for employees, the employee cannot bring a claim in court.[31]

If you decide to use a tip pool, evaluate your tip pooling policy to ensure that tips are distributed to all classes of employees who contribute to the patron's service.

You can elect to maintain direct table service policies to avoid problems with the DLSE and potential litigation over tip pooling issues. Employers are cautioned to seek legal counsel regarding tip pooling arrangements. You may not want a tip pool to avoid the risk of creating a policy that is later determined unlawful.

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[27] Lab. Code sec. 351

[28] Lab. Code secs. 351, 350(d)

[29] Lab. Code sec. 351

[30] *Jameson v. Five Feet Restaurant, Inc.*, 107 Cal. App.4th 138 (2003)

[31] *Lu v. Hawaiian Gardens Casino, Inc.*, 50 Cal.4th 592 (2010)

Automatic Gratuities and Mandatory Service Charges

Restaurants commonly add an automatic gratuity or mandatory service charge to bills for large parties. An example would be a 15 percent charge added to the cost of a banquet.

In most instances, mandatory service charges are not considered tips according to the California Division of Labor Standards Enforcement (DLSE). When a business establishes a non-voluntary, flat charge or a set percentage of a bill that must be paid by the customer, that amount belongs to the business and is not classified as a tip or gratuity left for the employee.

This practice also has wage and tax implications for employers.

The Internal Revenue Service (IRS) treats automatic gratuities as "wages" for payroll tax purposes.

Simply labeling a dollar amount as a "tip" does not mean it really is a tip. According to the IRS, a tip must have the following four characteristics:

- The payment must be made free from compulsion;
- The customer must have the unrestricted right to determine the amount;
- The payment should not be the subject of negotiation or dictated by employer policy; and
- Generally, the customer has the right to determine who receives the payment.

The absence of any one of the above factors "creates doubt" as to whether a payment is a tip and indicates that the payment may be a "service charge."

Besides the payroll tax implications, the distinction between whether the amount added is a tip or a service charge can affect employee wages.

A service charge belongs to the business; it's not left for the employee. Therefore, according to the DLSE, if an employer pays out all or a portion of the service charges to employees, these payouts must be included in the employee's regular rate of pay and must be factored into any overtime calculation. To calculate an employee's regular rate of pay, you must divide all compensation for the week by the total number of hours worked.

Credit Card Tips

If you permit patrons to pay tips by credit card, employees must receive their tip amounts no later than the next regular payday following the date the patron authorized the credit card payment. You must keep accurate records of tips received, including those received by employees through a customer's credit card.[32] You cannot offset the cost of credit card charges you incur against tips paid by the customer on a credit card. Because you chose to use the services of the credit card company, you, not the employee, must bear the cost of using that service.[33]

Any amounts paid directly by a patron to a dancer covered by Wage Order 5, Public Housekeeping Industry, or Wage Order 10, Amusement and Recreation Industry, are considered gratuities.

Bonuses

A bonus is money you give to an employee in addition to the salary or hourly rate usually due as compensation. Bonuses can be in the form of a gratuity where there is no promise for payment (for example, you decide at the end of the year to reward employees for a job well done) or when you promise a bonus in return for a specific result (for example, you promise a specific or percentage bonus if the organization adds 50 new clients).[34]

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[32] Lab. Code sec. 351, 353

[33] *Hudgins v. Neiman Marcus*, 34 Cal. App. 4th 1109 (1995); Lab. Code sec. 351

Bonuses are often confused with commission wages. Usually, bonuses are not predicated upon the price of a particular product or service, which distinguishes them from commission wages. Another difference is that many times, a bonus is paid to individuals not engaged in sales at all.

Legal Considerations of Bonus Programs

An employee incentive compensation plan (ICP) based on your profits, calculated by subtracting operating expenses from revenues, is lawful. An employer that offers supplementary compensation, in addition to regular wages, designed to reward employees if and when their collective efforts result in higher profits for the organization is not a violation of California wage protection laws.[35]

In *Prachasaisoradej v. Ralphs Grocery Company, Inc.*, a store offered an incentive plan to certain employees, with the amount dependent on the profits of each store. The formula for the plan subtracted the store's operating expenses from the revenues. Some employees argued that this violated state law, which prohibits employers from deducting wages from the cost of doing business.

The California Supreme Court held that the bonus plan was not an entitlement or expectation of a specific amount that was then deducted from the store's business costs. The employees all earned the amount of money that they were promised as wages for the hours they worked, regardless of the store's profit or loss. The bonus was an additional sum of money paid if the store was profitable and this was not a violation of California law.

Commissions

Compensation is generally considered a true commission if it is based on a proportional amount of sales of your property or services.[36] The employee receiving the commission must be involved principally in selling the goods or services on which the commission is measured.

Commission wage compensation plans present some difficult problems for employers. Each plan presents some unique features that must be interpreted and applied to establish the parties' rights and liabilities.

In *Keyes Motors, Inc. v. DLSE*, a California Court of Appeal defined the term "commission wages" with two requirements:

- The employees must be involved principally in selling a product or service, not making the product or rendering the service.
- The amount of their compensation must be a percent of the price of the product or service they sell.[37]

In *Muldrow v. Surrex Solutions Corp.*, a California Court of Appeal added to the definition of "commission wages" outlined by the *Keyes* court. Instead of requiring employers to strictly limit commission wages to a percentage of products or services sold, the *Muldrow* court's decision permits employers, in some circumstances, to base commissions on overall company revenue.[38]

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[34] DLSE *Enforcement Policies and Interpretations Manual* sec. 2.5.5

[35] *Prachasaisoradej v. Ralphs Grocery Company, Inc.* [illegible]

[36] Lab. Code sec. 204.1; *Keyes Motors, Inc. v.* [illegible]

[37] *Keyes Motors, Inc. v. DLSE*, 197 Cal. App. 3d 557 (1988)

[38] *Muldrow v. Surrex Solutions Corp.*, 208 Cal.App.4th 1381 (20[illegible]

Tyrone Muldrow worked for Surrex Solutions Corporation as a recruiter. When a client contacts Surrex with a job opening, Muldrow would attempt to find candidates qualified for that position.

Surrex used two compensation structures. First, when Surrex directly placed a candidate with an employer and received a placement fee from the employer, Muldrow received a percentage of that payment. Muldrow conceded that this type of payment constituted a commission.

In other cases, Surrex billed clients an hourly rate for candidates placed as consultants. In this structure, Muldrow received a percentage of the annual gross profit generated by the placed consultant. Muldrow argued that this compensation structure was not commission pay because it was not a straight percentage of the payment for the service he provided — adjusted gross annual profit included factors such as costs, overhead and benefits.

The court found that limiting the definition of "commissions" only to a percentage of sales price — rather than including other factors that affect overall revenue — constituted an "excessively wooden and narrow" application of the law. Commissions may be calculated based on price and net profit rather than just price.

Employers need to be cautious. The Office of the Labor Commissioner, in its enforcement manual, notes that many employees who receive payments based on performance of services are actually receiving a piece rate, not a commission. The Labor Commissioner has also stated its opinion that pay plans involving employees who share in a percentage of the profits of a store often are not receiving a commission, but a hybrid hourly plan based on profits.[39]

Employers should also make sure the employee meets the first part of the test and is actually engaged in selling goods and services. In *Muldrow*, the employee argued that a recruiter did not "sell" a product or service under the first prong of the *Keyes* test, but the court disagreed. The court found that the recruiter "sold" both the candidates and the clients on job placement and engaged in sales-related activity: persuading the candidate that he or she was the right person for the job, convincing the business client that the candidate was qualified, and helping both sides agree on an appropriate wage.

Although the California Labor Code considers commissions wages, the right of an employee for commission payments depends on the terms of the contract for compensation.[40]

For more information, see "Commissioned Inside Sales Employee Exemption" in Chapter 4, page 66.

Written Commission Agreements

A law, applying to employers who pay commission wages to employees, requires that:[41]

- The employer provides commission agreements in writing
- The agreement contains the method by which commissions are computed and paid
- The employer gives employees a signed copy of the agreement
- The employer obtains a signed receipt from each employee, acknowledging that the employee received a copy of the agreement

If the contract expires and the employee continues working for the employer, the terms of the expired contract are presumed to remain in effect.

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[39] DLSE *Enforcement Policies and Interpretations Manual* sec. 2.5.4 and sec. 34.1.2

[40] *Nein v. HostPro, Inc.*, 174 Cal. App. 4th 833 (2009)

[41] Lab. Code sec. 2751

For purposes of this law, the definition of "commissions" excludes:

- Short-term productivity bonuses
- Bonus and profit-sharing plans, unless there is an offer by the employer to pay a fixed percentage of sales or profits as compensation for work.
- Temporary, variable incentive payments that increase, but do not decrease, payment under the written contract.

An example of a "temporary variable incentive payments" is a car dealership that offers a short-term sales incentive for a limited number of vehicles for sale for an upcoming weekend. The law allows dealers to offer such temporary incentives without triggering a completely new commission agreement each time, as long as the incentive increases and does not decrease such commissions.

The definition of "commissions" is one that can cause confusion for employers. Consult with legal counsel to determine if your commission payments are covered by this requirement.

The commission agreement you use is specific to your organization and the particular employee involved. The agreement should contain, among other things, specific details relating to computation of the commission, conditions required before commissions are earned and advances. Boilerplate agreements not specific to the particular employee(s) involved are generally insufficient.

Sciborski v. Pacific Bell Directory provides an example of why detailed commission agreements are so important.[42] The lawsuit was filed by a union member who worked under a collective bargaining agreement (CBA) between the union and Pacific Bell. The CBA contained information on:

- When a commission was earned
- The conditions that had to be satisfied for a commission to be earned
- Deductions for commission advances

However, the CBA contained nothing about what would happen if a commission was paid based on a clerical error. The employee was given a new customer account because of a clerical error, made a large sale for advertising and was paid the full commission, with the approval of her supervisor. Under the CBA's terms, the employee was not entitled to sell advertising to new customers and the union protested the payment of the commission.

The employer began deducting from the employee's wages and account as repayment of the commission. The employee eventually quit to stop the deductions, and sued the employer, claiming violation of Labor Code section 221.

California Labor Code section 221 prohibits employers from engaging in "self-help" by withholding from an employee's wages any money owed to the employer. However, in the case of commission wages, the employer and employee often have a written agreement that provides for an advance on commissions, and a charge-back for recouping commission advances if the conditions required for payment of a commission are not met. For more information on making proper deductions, see "Deductions From Wages" on page 271.

The court of appeal upheld the verdict in favor of the employee. The court concluded that Labor Code sec. 221 does not prohibit an employer from recouping commission wages paid if the conditions of the contract are not met. However, once the employee meets the conditions expressed in the commission contract, the commission is considered a wage and the employer cannot engage in "self-help" and deduct the already earned and paid money from the employee's wages — whether it was a commission or other wages. A clerical error does not permit the employer to violate state law by making an illegal deduction.

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[42] *Sciborski v. Pacific Bell Directory*, 205 Cal.App.4th 1152 (2012)

Employers should make certain that their written commission agreements include all conditions that must be met before a commission is "earned." The commission agreement should detail when and how commission payments are made — for example the first and fifteenth of the month, for commissions earned and accounts paid in full in the preceding pay period.

Commission Pool Arrangements

In some situations, the commission payable to the employee is based on a pool arrangement. Under this arrangement, a group of employees, all of whom must be engaged principally in selling the products or services on which the commission percentage is based, share in the pool. Such an arrangement constitutes a commission scheme if all other requirements of the law are met.

Advances, Draws and Guarantees on Commissions

A commissioned employee can receive a sum of money that is intended as an advance, draw or guarantee against the expected commission earnings. In California, employers must pay these sums at least twice a month. If an employee receives a draw against commissions to be earned at a future date, the "draw" must be equal at least to the minimum wage and overtime due the employee for each pay period (unless the employee is exempt, i.e., primarily engaged in outside sales).[43]

These sums are usually a smaller amount of money than what the employee is expected to earn in commissions. If the commission earnings for that period are greater, the smaller amount is deducted from the commission earnings when the commissions are reconciled. For example, an employee is paid $2,000 per month as an advance. The employee goes on to earn $5,000 in commissions for the month. The $2,000 advance is deducted from the commission payment. The employee receives the $3,000 commission payment plus the $2,000 advance.

Although the draw may be reconciled against earned commissions at an agreed date or when the commission is earned, the draw is considered the basic wage and is due for each period the employee works even though commissions do not equal or exceed the amount of the draws, unless there is a specific agreement to the contrary.[44]

However, there must be a specific commission agreement that states advances will be repaid out of future commissions. Failure to have an agreement will result in the advance being considered payment in lieu of salary and therefore the employee's minimum compensation.

Reconciliation of draws against commissions are to be construed according to the contract of employment but must be completed within a reasonable time depending on the transactions involved.[45]

A California Court of Appeal clarified an employer's obligations under a commission compensation plan that permits "chargebacks" against commission advances. According to the court, chargebacks on advances do not constitute an unlawful underpayment of wages, and any chargeback formula must be clearly stated and communicated to employees.[46]

The plaintiff worked as a sales representative for Verizon Wireless. Verizon paid him an hourly wage plus monthly commissions on the number of cell phone service plans he sold. The Verizon compensation plan stated that it would pay sales representatives their commissions at the time a customer purchased a cell phone (an "advance"), but that representatives did not earn the commission until the customer kept the phone for a specified period of time (the "chargeback period").

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[43] DLSE *Enforcement Policies and Interpretations Manual* sec. 34.2

[44] *Agnew v. Cameron*, 247 Cal. App. 2d 619; 55 Cal. Rptr. 733 (1967)

[45] DLSE *Enforcement Policies and Interpretations Manual* se

[46] *Deleon v. Verizon Wireless LLC*, 207 Cal.App.4th 800 (2012)

Key to the court's decision is the definition of an "advance" against future commissions. Sales commissions are wages, but an employee's right to the commission depends on the terms of the compensation contract. An advance against a future commission is not a wage, because all conditions for the employee to become entitled to payment have not yet been satisfied. The court noted that a payment is an advance when the employer "cannot determine whether the commission will eventually be earned because a condition to the employee's right to the commission has yet to occur ..."

The court stated that the commission payments to the employees were lawful advances, not wages. The Verizon policy clearly stated that employees did not earn their commissions at the time of the sale of a cell service plan, and referred to all up-front payments to employees as "advances." Therefore, the policy of reducing the next advance for a customer's cancellation of service during the chargeback period did not underpay "wages."

The commission plan must be clear and unambiguous. As mentioned above, California law now requires all commission agreements to be in writing.

Forfeiting Commissions

Each commission payment plan is unique. You must base the commission wage computation on the plan. Many commission plans state that certain conditions must be met before the commissions are payable, creating forfeitures. A distinction must be drawn between compliance with the conditions and forfeitures.

As a general rule, the employee must complete the condition to be entitled to recover the commission wage. Unless you prevented the employee from completing the condition — for example, by discharging the employee before the commission is earned — or the condition is impossible to complete as a result of conditions beyond the parties' expectations, the employee's failure to complete the condition will result in no commission being owed.

Courts do not favor forfeitures. Unless the language about the forfeiture is clear and unambiguous, the courts will not enforce the language if any logical reading of the contract would avoid the forfeiture. But if the forfeiture is clearly provided in the contract's language or the parties' agreement is within the parties' expectations and does not violate public policy, the forfeiture is valid and enforceable.

In *Steinhebel v. Los Angeles Times Communications*, a California Court of Appeal ruled that an employer can lawfully deduct unearned commissions from future compensation advances without violating the California Labor Code. The case involved a commission plan for a newspaper's telephone salespeople that created commissions based on sales from the preceding pay period. An employee training manual described the plan, as did a written agreement signed by the employees. This agreement provided that the commission was not earned until the employer approved the sale and the customer maintained the subscription for at least 28 days. The employee agreement gave the employer the right to deduct chargebacks from subsequent pay.

A group of employees sued, alleging that chargebacks of commissions for cancelled subscriptions constituted illegal deductions from pay. The court agreed that an employer can chargeback unearned commission advances paid prior to completion of all conditions that were to be satisfied before the commissions are due. The commission was not actually earned until the conditions were satisfied.[47]

A different result occurred in *Harris v. Investor's Business Daily, Inc.* Newspaper telemarketing employees questioned their employer's charging them back for canceled subscriptions. The employer's policy said that any subscription canceled within 16 weeks would result in the full point value of the commission being charged back to the salesperson. The court found the policy to be unclear if the employees earned full commission after the 16-week mark or if the commission is earned at the time of the sale. If the commission is indeed earned at the time of the sale, the organization policy would amount to an unlawful chargeback.[48] Again, the parties' agreement and the parties' expectations are critical in determining if the forfeiture will be allowed.

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[47] *Steinhebel v. Los Angeles Times Communications*, 126 Cal. App. 4th 696 (2005)

Outside Sales and Commissions

In some circumstances, outside commissioned salespeople are exempt from minimum wage and overtime requirements. An outside salesperson is one who regularly spends more than half of his/her working time outside the organization offices selling or obtaining orders for a product or service. You must pay sales commissions earned by outside salespeople no later than when you receive the money for the sale from the buyer. This rule prevails even after the outside salesperson leaves the organization.[49] Employees classified as outside sales may not always be exempt under the California Supreme Court decision in *Ramirez v. Yosemite Water*. For more information, see "Outside Salesperson Exemption" in Chapter 4, page 65.

Exempt Analysis Worksheet - Salesperson Exemption

Inside Sales and Commissions

An inside salesperson sells merchandise in a store or sales lot or sells a product or service via an organization's telephone. Inside salespeople are nonexempt, therefore, minimum wage and overtime apply. An inside salesperson who is paid by commissions is entitled to minimum wage pay each week if his/her commissions during the 40 hours of the workweek add up to less than the total of 40 hours multiplied by the minimum wage. You cannot recover this money even if the inside salesperson goes on to have a string of unsuccessful sales weeks and then leaves the job having earned less in sales than he/she was paid in minimum wage.[50] You must pay sales commissions for inside salespeople no later than when the money for the sale is received from the buyer, even if the salesperson leaves the organization. You must pay commission wages to vehicle salespeople at least once per month.[51]

For more information, see "Commissioned Inside Sales Employee Exemption" in Chapter 4, page 66.

Overtime Exemption for Commissions

Employees working under Wage Order 4 (Professional, Technical, Clerical, Mechanical and Similar Occupations), and Wage Order 7 (Mercantile Industry), are not entitled to overtime under California law if their earnings exceed 1.5 times the minimum wage and more than half of the employee's compensation represents commissions.[52] The employee must also meet one of the federal exemptions to be exempt from federal overtime requirements.

Because this overtime exemption is conditioned, in part, on the amount of earnings attributable to commissions, it is critical that those earnings satisfy the definition of commission. The California Labor Code defines "commission" as compensation paid for services rendered in the sale of property or services based proportionately on the amount or value of the sale.[53]

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[48] *Harris v. Investor's Business Daily, Inc.*, 138 Cal. App. 4th 28 (2006)

[49] *Prudential Insurance Co. v. Fromberg*, 240 Cal. App. 2d 185 (1966)

[50] *Leighton v. Old Heidelberg Limited*, 219 Cal. App. 3d 1062 (1990)

[51] Lab. Code sec. 204.1

[52] IWC Wage Orders 4 and 7 sec. 3

[53] Lab. Code sec. 204.1

In *Harris v. Investor's Business Daily, Inc.*, an employer who was relying on the sales exemption from overtime used a compensation plan that did not meet the definition. The employer lost the overtime exemption for its sales force. In that plan, employees selling newspaper subscriptions received varying point levels based on the subscription's duration and other sales activities. The commission was based on the number of points earned, but the point values were not tied to the value of the subscription sold. As an employee earned more points, the dollar value of the points increased. The Court of Appeal found these payments were not a commission and could not be considered in compliance with the exemption requirements. The employees did not meet the exemption test.[54] For more information, see "Outside Salesperson Exemption" in Chapter 4, page 65, and "Commissioned Inside Sales Employee Exemption" in Chapter 4, page 66.

Vacation Benefits and Commissions

California law does not require you to provide vacation benefits. If you do provide vacation benefits, they are considered deferred wages and are earned and vested, or accrued, as an employee works. At the time employees terminate employment for any reason, they are entitled to be paid for all earned but unused vacation. If you have a paid time off (PTO) program that includes vacation benefits along with other sick leave or other wage replacement benefits, the entire accrual of PTO must be treated as vacation.

California law does not permit use it or lose it forfeiture policies regarding vacation or PTO benefits. However, the law does permit reasonable caps on vacation accruals that may prohibit further accruals when a cap is reached. After the employee uses enough vacation or PTO to fall below the cap, accrual begins again.

There is no specified method under the law for employers who offer vacation benefits to commissioned employees to compute the dollar value of accrued vacation leave. You can base vacation pay on an average earnings figure over a reasonable time period or pay a set hourly amount regardless of actual normal earnings.

To avoid disputes, include the method of determining vacation pay in company policy or a contract with commissioned salespeople.

For more information on Vacation and PTO, see Chapter 21, "Vacation, Paid Time Off and Holidays."

Split Shift Pay

A split shift is any two distinct work periods separated by more than a one-hour meal period. If there is more than one hour between shifts, the employee must receive one hour's pay at no less than the minimum wage rate for the time between shifts.[55] You can use any hourly amount the employee earns above minimum wage to offset the split shift requirement. In addition, you need not count the compensation for the time between split shifts for overtime purposes because it is not compensation for hours actually worked.

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[54] *Harris v. Investor's Business Daily, Inc.*, 138 Cal. App. 4th 28 (2006)

[55] IWC Wage Orders sec. 4(C)

One Hour Split Shift Due

The following example is typical for a restaurant employee earning minimum wage working the lunch and dinner shifts.

Hourly wage:	$10.00
Hours worked:	11:00-2:00 and 4:00-9:00 (total of eight hours)
Split shift wage:	One hour at $10.00
Wages due:	Eight hours worked ($80.00) plus one split shift hour ($10.00) = $90.00.

Though the employee was paid for nine hours, the employer does not owe overtime because the employee only worked eight hours in the day.

If the employee in the example above received a higher hourly wage, the split shift requirement would be either fully or partially offset.

Split Shift Partially Offset by Hourly Wage

Hourly wage:	$10.15 (15 cents higher than minimum wage)
Hours worked:	11:00-2:00 and 4:00-9:00 (total of eight hours)
Split shift wage:	One hour at $10.00
Offset:	15 cents x 8 hours = $1.20 (split shift partially offset: $10.00 - $1.20 = $8.80)
Wages due:	Eight hours worked ($81.20) plus partially offset split shift hour ($8.80) = $90.00

Split Shift Completely Offset by Hourly Wage

A California court has clarified that when a split shift is worked, an employee is properly compensated if total pay for the day is at least minimum wage for all hours worked plus an additional hour at minimum wage. In *Aleman v. AirTouch Cellular*, the employees argued that they were entitled to their regular wage of $10.58 per hour plus one hour at the minimum wage. The court rejected this argument. The court held that if the worker receives at least minimum wage for all hours worked plus an additional hour of pay at the minimum wage rate, no additional or "split shift pay" is owed.[56]

The court gave the following example:

- Employee worked eight hours. Employee made $10.58 an hour and was paid a total of $84.64 (8 x $10.58). Minimum wage at the time was $6.75 so a minimum wage employee working a split shift would make $54 (8 x $6.75), plus one hour of split shift pay at minimum wage for a total of $60.75 ($54 +$6.75). Since the employee actually made $84.64 this day, which is more than the $60.75, the employee was not entitled to extra pay.

Ruling on Split Shifts

California law defines a split shift as a work schedule that is interrupted by non-paid working periods set by the employer, other than meal and rest periods. For example, a restaurant server works lunch and dinner shifts on Monday from 11:00 a.m. to 2:00 p.m. and then reports again from 4:00 p.m. to 9:00 p.m.

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[56] *Aleman v. AirTouch Cellular*, 209 Cal.App.4th 556 (2012)

The California Court of Appeal clarified what is and what is not a split shift. The court ruled that consecutive overnight shifts that are not interrupted by unpaid, nonworking periods are not split shifts.

The case involved security guards who sometimes worked night shifts beginning on one workday and ending on the next. The security guards filed a class action lawsuit, alleging that the company failed to pay them mandatory split shift pay.

The security guards argued that a split shift occurs whenever an employee works two nonconsecutive periods in the same workday, such as when a shift begins on one workday and ends on another, and the employee then returns to work several hours later on the second workday.

It is an important argument; if more than one hour separates the shifts, employers must pay an additional one hour of pay at no less than the minimum wage rate. Employers do not need to count the compensation that is paid between split shifts for overtime purposes since it is not compensation for hours actually worked.

In this case, the employer argued that an uninterrupted work shift that continues through midnight and thus falls into two calendar days and two workdays is not a split shift. The employer, in this case, defined the workday as beginning at midnight and ending the following midnight.

The court agreed with the employer, emphasizing that "the fact that a single continuous shift happens to begin during one 'workday' and end in another does not result in a 'split shift.'"[57]

Shift Differential Pay

Though many employers *choose* to pay a small premium, called a "shift differential," to employees who work swing, graveyard or other less desirable shifts, no law *requires* you to pay a shift differential.

If you choose to pay a shift differential, this amount is added to the hourly rate of pay when determining the regular rate of pay.

Reporting Time Pay

Reporting time pay is designed to discourage you from requiring employees to report to a job unless there is work to be done. You must pay reporting time pay in a number of circumstances.

An employee reports for work as scheduled or at your request but is not put to work or is given less than half of the hours he/she was scheduled for or usually worked. In this case, you must pay reporting time pay. You must pay the employee for at least half of the hours he/she was scheduled for or usually worked, but never less than two hours pay and never more than four hours pay.

Scheduled Hours	Hours of Reporting Time Pay Owed
10	4
9	4
8	4
7	3.5
6	3
5	2.5
4	2

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[57] *Securitas Security Services USA, Inc. v. Superior Court*, 197 Cal.App.4th (2011)

Scheduled Hours	Hours of Reporting Time Pay Owed
3	2
2	2

You also owe reporting time pay if an employee is required to report to work a second time in any one workday and is given less than two hours of work on the second reporting. In this case, the employee must receive at least two hours pay for the second appearance.[58] These provisions do not apply to employees:

- On a paid standby status, who are called to work at times other than their usual shift
- When operations cannot begin due to threats to you or property or when recommended by civil authority
- When public utilities fail, such as water, gas, electricity or sewer
- When work is interrupted by an act of God or other causes not within the employer's control

Reporting time pay must be paid if an employee reports to work at an assigned time and is told that there is no work but to report back later. The employee would be entitled to pay for one-half his regular shift (not less than two hours) even though he may report back later and work a full shift. If, at the subsequent reporting time, the employee is not provided with at least two hours of work, he is entitled to at least two hours pay.[59]

When an employee is called in to work on a day other than his/her normal work schedule, that employee must be paid reporting time pay. This is sometimes referred to as call-in pay.

Required Meetings

Sometimes, you may require employees to attend meetings. The Division of Labor Standards Enforcement (DLSE) gives the following advice about reporting time pay and required attendance at meetings:

- When the employee is required to attend a meeting on a day he/she is not scheduled to work, you must pay reporting time pay as shown in "Reporting Time Pay" on page 265.
- If the meeting takes place on an employee's regularly scheduled work day but the employee must return sometime after the end of his/her shift to attend the meeting, you must pay two hours of reporting time pay.[60]

Section 5 of California's Wage Orders requires that employers pay employees who report to work and who are not provided with work for one-half of their usual or scheduled day's work, (no less than two hours and not more than four hours), at their regular rate of pay.

In *Price v. Starbucks,* an entry-level employee worked for approximately 13 scheduled shifts. The employee was called in by his supervisor "to have a talk" on a day that he was not scheduled to work. The "talk" consisted of the employee being terminated. He received a check for work performed for that pay period, including two hours of reporting time pay for reporting on the day of his termination.

The employee claimed he should have been given pay for half of his shift on the day of his termination, based on the average number of hours worked for his employment.

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[58] IWC Wage Orders sec. 5

[59] DLSE *Enforcement Policies and Interpretations Manual* sec. 45.1.2

[60] DLSE *Enforcement Policies and Interpretations Manual* sec. 45.1.4

The court determined that the employee was not entitled to more than two hours of reporting time pay. He was not scheduled to work the day he was terminated, but was asked to report to the office for a meeting. There was no expectation that he would work that day, and nothing in the statute requires that the employer average the hours worked in order to determine reporting time pay for attending a meeting on a non-workday.[61]

A California court ruled that employees who reported to work for regularly scheduled short meetings were not entitled to additional reporting time pay. The case is significant because it differs from the enforcement position of the DLSE as discussed in its enforcement manual. The court specifically disagreed with the DLSE's interpretation of the Wage Order and noted that the DLSE's determinations are not binding. Although the decision is favorable for employers, it is a case of first impression and offers a divergent viewpoint from that taken by the DLSE.[62]

The case, *Aleman v. AirTouch Cellular*, involved sales and customer service representatives who were required to attend store meetings on a Saturday or Sunday morning before the store opened. The meetings usually lasted an hour and a half. The meetings were scheduled about four days in advance, listed on the employee's work schedule, and recorded on AirTouch's electronic timekeeping system. The workers complained that AirTouch paid them only for the length of the meetings.

The workers argued that they should have received a minimum of two hours and up to four hours of reporting time pay (1/2 the regular shift) on those days that they came in for scheduled short meetings.

The court of appeal disagreed. The court ruled that when an employee is scheduled to come in to work for only a two-hour meeting, the employee is entitled to reporting pay only if the meeting lasts less than half of the scheduled time (in this case, less than one hour). When the AirTouch employees attended the meetings, they were there for the scheduled time and paid for that time. They did not work "less than half" the scheduled day's work and were not entitled to reporting time pay.

The court used these examples:

- The employee's only scheduled work for the day is an hour and a half mandatory meeting. The meeting ends a half hour early, and the employee works only one hour. The employer is not required to pay reporting time pay because the employee was furnished work for more than half the scheduled time. The employee is entitled to receive one hour of wages.
- The employee's only scheduled work for the day is an hour and a half mandatory meeting. The meeting ends one hour early so the employee works only 30 minutes. The employer is required to pay two hours of regular pay because the employee was not furnished work for more than half the scheduled time.

The court distinguished the *Price v. Starbucks* decision because in *Price*, the termination meeting was not scheduled in advance, while in this case all meetings were scheduled in advance. If AirTouch had called the employees in on their day off and then sent them home after working for a short period, the *Aleman* court probably would have ruled differently.

Employers should consult legal counsel if unsure about reporting time pay requirements.

Call-in Pay

When an employee is called in to work on a day other than his/her normal work schedule, that employee must be paid reporting time pay, as described in "Reporting Time Pay" on page 265.

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[61] *Price v. Starbucks Corp.*, 192 Cal. App. 4th 1136 (2011)

[62] *Aleman v. AirTouch Cellular*, 209 Cal.App.4th 556 (2012)

On-Call and Standby Pay

If you require an employee to stay at home or at work on an on-call or standby status, that time may qualify as hours worked, depending on how much you restrict his/her ability to actually have free time. Hours worked is defined as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether required to do so or not."

Under California law, if the employee is under your control, it is likely that you will have to pay him/her even if the employee is just sitting around waiting for something to happen. This is generally referred to as "controlled standby." On the other hand, on-call time is not compensable if the employee can use the time spent on-call primarily for his/her own benefit, generally referred to as "uncontrolled standby."

Courts typically consider the following in looking at whether on-call time should be paid (controlled standby):

- Are there excessive geographic restrictions on the employee's movements?
- Is the frequency of calls unduly restrictive?
- Is there a fixed time limit for the employee to respond to the call that is unduly restrictive?
- Can the on-call employee easily trade his/her on-call responsibilities with another employee?
- Can the employee engage in personal activities during on-call periods? If so, to what extent?
- What is the nature of the employment relationship and the industry practice?
- Are there any other limitations on the employee's ability to use the time for his/her own benefit?[63]

Agreements between you and your employee that the on-call time is noncompensable do not hold up against state requirements. If the time meets the above criteria, it must be paid — regardless of any agreement.

There is no hard and fast rule. If the required response time, in practice, unreasonably restricts the geographical boundaries of the worker, then that would likely be controlled standby and compensable.

The mere fact that an employee carries a cell phone or similar device does not usually mean that the time counts as compensable hours worked, as long as the employee is free to come and go as he/she pleases.

You must give the employee sufficient time to report so that he/she can be free to use the off duty time to his/her own benefit. Sufficient time to report is generally at least 20 to 30 minutes, depending on geographic population density.

If the employee is on controlled standby, both the time spent on standby and the time spent on call-backs is counted as time worked. If the employee is on uncontrolled standby, the time spent on call-backs during a standby period is counted as time worked. You must pay call-back or controlled standby time the same as regular hours worked. You must pay the regular or agreed wage for this period, as well as applicable overtime.

If the employee is on controlled standby, time worked includes a reasonable time for travel both to and from the worksite from the point at which the employee is summoned to return to work. Use good judgment and be reasonable when you determine travel time. For example, consider an employee who lives three miles from the worksite. However, when you call him to return to work at 12:00 p.m., he is at the beach 20 miles away. The employee returns and works until 9:00 p.m. In this case, the travel time would be calculated from the beach to the worksite and back to the employee's home.

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[63] *Berry v. County of Sonoma*, 763 F. Supp 1055 (1990); *Madera Police Officers Assoc. v. City of Madera*, 36 Cal. 3d 403 (1984)

If the employee is on uncontrolled standby, you will need to pay the employee for travel time if he/she is reporting to a client's premises, versus reporting to his/her regular place of business. For example, if the employee is called to go fix a network problem at a client's office, you would pay the employee travel time. This is the same rule that would apply for normal travel time before and after the employee's regular work day. For more information, see "Travel Time" in Chapter 12, page 307.

On the other hand, if an employee who is on uncontrolled standby is called back to the employee's regular place of business, there is no bright line rule that applies, and many employers do not pay for that time. The Department of Industrial Relations (DIR) does not appear to enforce a rule requiring employers to pay for call-back travel time to the regular place of business when an employee is on uncontrolled standby.

On the other hand, if an employee who is on uncontrolled standby is called back to the employee's regular place of business, there is no bright line rule that applies, and many employers do not pay for that time. The Department of Industrial Relations (DIR) does not appear to enforce a rule requiring employers to pay for call-back travel time to the regular place of business when an employee is on uncontrolled standby.

On-Call Resident Employees

Some businesses have employees who stay overnight on the premises, such as security guards or apartment managers.

Certain Wage Orders have specific rules, and you should always refer to the Wage Order that covers your particular business. For instance, on-call resident employees, such as resident managers, under Wage Order 5, Public Housekeeping Industry, need only be paid for time spent performing their assigned job duties. Under Wage Order 5, you are not required to pay on-call resident employees for the time they spend on-call if they can freely engage in personal activities, regardless of any geographic restrictions you impose on these activities.[64]

For most purposes, however, the rules regarding on-call pay for employees who stay overnight on the employer's premises are the same as for other on-call employees. Whether the employee should be paid depends on how much control you exert over the employee's activities. Employees should be paid for on-call time when they cannot leave the premises and are significantly restricted from engaging in non-work, personal activities.[65]

lew 2016

A California Supreme Court case discussed how to handle on-call time when security guards were required to stay overnight on the employer's premises.[66] The case involved employees under Wage Order 4 and does not apply to other Wage Orders that are relative to resident employees.

CPS Security Solutions provided security guards for building construction sites. Part of the guards' day was spent on regular security patrols. Nights were spent at the guards' assigned job site in CPS residential trailers. Guards were required to be on-call, investigate alarms and suspicious activity, respond to disturbances and prevent vandalism and theft.

The guards signed on-call agreements with CPS. If the trailer guard wanted to leave the jobsite during on-call hours, the guard had to notify a dispatcher, provide information as to where the guard was going and for how long, and wait for a relief guard. The guard had to remain within a 30-minute radius, carry a pager and respond immediately if called. If no relief guard was available, CPS could order the guard to remain on the premises, even if the guard had an emergency.

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[64] *Isner v. Falkenberg/Gilliam Associates*, 160 Cal. App. 4th 1393 (2008)

[65] *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal.4th 833 (2015)

[66] *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal.4th 833 (2015)

The guards were allowed to keep personal items in the trailers. Adult visitors were permitted only with prior approval, and children, pets and alcohol were not permitted at any time on the premises.

On the weekdays, the guards were on patrol for eight hours and on-call for eight hours. During the nighttime shifts, CPS did not compensate the guards for the on-call time, except for time actually worked (responding to disturbances). If a guard spent three or more hours engaged in investigations during the on-call period, the guard would be paid for the entire eight hours.

On the weekends, the guards worked 24-hour shifts and were on patrol for 16 hours and on-call for eight hours.

One of the guards, Tim Mendiola, sued CPS on behalf of himself and other guards for unpaid wages and overtime. The lawsuit alleged that the on-call policy violated the Labor Code and the applicable Wage Order (Wage Order 4).

The main issues before the Court were whether the hours spent "on-call" and in the trailers should count as "hours worked" and be paid to the guards and whether CPS could exclude up to eight hours of sleep time from the guards' 24-hour weekend shifts.

As to the issue of on-call compensation, the California Supreme Court held that the guards were entitled to compensation for all on-call hours spent at their assigned worksites under their employer's control. The Supreme Court ruled that compensation was warranted because CPS exercised significant control over the guards' activities during the on-call time.

CPS exercised significant control over the guards' activities: the guards were required to live onsite, respond promptly, and were not free to leave at-will, but only when a reliever was available.

The guards also were "substantially restricted" in their ability to engage in private pursuits and could not enjoy the "normal freedoms of a typical off-duty worker" — no children, pets, or alcohol and no visits with adult friends or family without permission.

Additionally, the Supreme Court found that "the guards' on-call time was spent primarily for the benefit of CPS." The restrictions on the on-call time were primarily directed toward fulfilling an important function for the employer and its clients — deterring theft and vandalism. Thus, the guards were entitled to minimum wage and overtime for all such hours.

On the issue of excluding sleep time, the California Supreme Court held that CPS could not exclude eight hours of sleep time from the guard's 24-hour weekend shifts. Here, the Supreme Court reversed the court of appeal. The court of appeal, relying on other cases and federal regulations, ruled that CPS could exclude eight hours of sleep time from the guard's work time when working 24-hour shifts as long as the sleep time was uninterrupted; a comfortable place was provided; and the parties entered into an agreement specifically excluding the sleep period from compensation.

The Supreme Court rejected this analysis and the applicability of the federal regulations to California's specific Wage Orders (here, Wage Order 4). The Supreme Court held that Wage Order 4 does not permit the exclusion of sleep time from compensable hours worked in 24-hour shifts.

This case is limited to Wage Order 4; different Wage Orders, such as those applying to ambulance drivers, etc., contain different language allowing for the exclusion of sleep time. This case is also an example of a situation where the employer exhibited significant control over on-call time, with a requirement that employees stay on-premises.

Power Outage Pay

This section explains how to pay employees during rolling blackouts or power failures.

Sending Employees Home Due to Power Outages

If there is a power outage, you can send employees home. Pay requirements differ for exempt and nonexempt employees.

Reporting time pay requirements do not apply when public utilities fail to supply electricity, water or gas, or there is a failure in the public utilities or sewer system. If you send a nonexempt employee home because of a power outage, you would only pay that employee for the time he/she actually worked that day.

If an exempt employee worked any part of the day, he/she is entitled to a full day's pay if sent home due to a power outage. You cannot make a deduction for the portion of the day not worked.

Calling Employees Back to Work After a Power Outage

If power is restored, you can call employees back to work to finish the rest of their shift. The normal call-back pay requirement — a minimum of two hours of pay for the second reporting in a single day — does not apply when public utilities fail to supply electricity, water or gas, or there is a failure in the public utilities or sewer system.

Requiring Employees to Remain at Work During a Power Outage

You can require employees to remain in the workplace to wait for power to return. However, even if employees do not perform any work, you must pay them for the time while waiting for power to be restored because they remain under your control.

If the power goes out near a scheduled meal period, you can take employees off the clock for a meal break for up to one hour. If power is still out when the break is over, you can require employees to wait it out in the workplace or send them home for the day.

Deductions From Wages

You cannot collect previously paid wages from an employee.[67] This prevents the fraud usually associated with kickbacks.[68] It is also unlawful for you to withhold any part of a collectively bargained wage with intent to defraud an employee, a competitor or any other person.[69] This prevents unlawful private agreements from nullifying collective bargaining contracts.[70]

The law also prohibits charging an employee for medical examinations required for employment or necessitated by law.[71] You cannot make a deduction of any type unless authorized by law or by the employee's written consent to cover medical plans or insurance.[72] No deduction can occur if it represents an attempt to evade minimum wage laws or a valid collective bargaining agreement.[73] Secret payments from employees back to you also violate the Labor Code.[74]

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[67] Lab. Code sec. 221

[68] *Sublett v. Harry's Tork & Taylor Lunch*, 21 Cal. 2d 273 (1942)

[69] Lab. Code sec. 222

[70] *Breitman v. Brady*, 113 Cal. App. 2d 642 (1952

[71] Lab. Code sec. 222.5

[72] Lab. Code sec. 224

Employers who fail to make agreed upon payments to a health or welfare fund, pension fund, vacation plan, or similar plan for the benefit of employees are guilty of a crime (felony if the amount unpaid is over $500).

It is also a crime for an employer to fail to remit withholdings from an employee's wages that were made pursuant to state, local or federal law (such as payroll taxes).

Standard Deductions: Taxes

You must make certain tax deductions from employee paychecks.

Tax	Deductions
Federal income tax	Use the employee's W4-Form – Employee's Withholding Certificate and the withholding methods described in Publication 15 from the Internal Revenue Service (IRS). You can download Publication 15 at the IRS website.
State income tax	For information about rates, forms, exemptions and withholdings, contact the Employment Development Department (EDD) or visit the website at www.edd.ca.gov.
Social Security (FICA) and Medicare	Both you and your employee must pay Social Security and Medicare taxes. The wage base limit remains the same for 2016. You must withhold and deposit the employee's withheld taxes and pay a matching amount at the following rates: • Social Security – 6.2 percent (wage base limit for 2016 is $118,500); and • Medicare – 1.45 percent (no wage base limit).
State Disability Insurance (SDI) tax and Paid Family Leave (PFL) tax	SDI provides temporary disability benefits for employees who are disabled by a nonwork-related illness or injury. You must withhold monies from each paycheck. PFL provides temporary disability benefits for employees who cannot work because of the need to care for a family member or bond with a child. You must withhold monies from each paycheck. The SDI withholding rate for 2016 is 0.9 percent, which includes the rate for PFL. The SDI taxable wage limit is $106,742 per employee, with an annual maximum withholding of $960.68 per employee.

Automatic 401(k) Payroll Deductions

Section 11 of the DLSE's *Policies and Interpretations Manual* relates to automatic 401(k) payroll deductions and offers guidance to employers who use self help methods to get repayments from employees.

Sections 11.1.1 and 11.1.1.1 cover deductions from wages relating to changes made by the federal Pension Protection Act of 2006 (PPA), which authorized employers to make an automatic deduction

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73. Lab. Code sec. 222

74. Lab. Code sec. 223

from an employee's pay for 401(k) contributions unless the employee opted out in writing. Previously, employees were required to opt in before you could make a deduction. The revision to this section of the DLSE manual reflects the explicit provisions of Labor Code section 224. Section 224 allows an employer to withhold or divert any portion of wages where the deduction is required or where the employer is empowered to do so by federal or state law.

For a 401(k) plan to qualify as an automatic contribution arrangement under federal law, your plan must meet federal statutory requirements. These requirements include specified features to ensure that the plan provides for automatic deferral of compensation, matching or nonelective employer contributions, and specific notice to employees about the automatic contribution, including the right to choose to receive cash payment.

According to the DLSE, because Labor Code section 224 authorizes diversion of a portion of wages when performed pursuant to federal law, you can make this automatic deduction. Section 224 also allows deductions when authorized by the employee in writing, but that authorization is limited to:

- Insurance premiums
- Hospital or medical dues
- Other deductions not amounting to a rebate or deduction from the wage paid to the employee

The revisions to the manual emphasize that Section 224 does not allow you to deduct an amount from an employee's pay which is for your use or benefit. The manual's prior versions contained some confusing language on the issue of employers using payroll deductions for self help, such as deducting employee loan repayments from subsequent paychecks, deducting the cost of damaged or destroyed organization property, and so on.

The DLSE made it clear that, consistent with California law, you can never make a payroll deduction unless a state or federal law clearly provides authorization for you to do so.

Employee Tardiness

If an employee is tardy, you cannot deduct from the employee's wages any amount in excess of the wage that would have been earned during the time actually lost. However, if the loss of time is less than 30 minutes, you can deduct 30 minutes of wages.[75]

Employee Debts, Loans and Deductions

While you can make deductions from wages for insurance premiums and other health and welfare plans, there are limits on other deductions.

Employers are prohibited from making deductions from wages that are, in effect, a self-help remedy for the employer.[76] Labor Code section 221 prohibits an employer from recovering wages already paid to an employee.

Simple Negligence

Because shortages and other losses occur without fault on an employee's part, or as a result of simple negligence, you must bear these losses as part of the cost of doing business.[77]

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[75] Lab. Code sec. 2928

[76] *Sniadach v. Family Finance*, 395 US 337 (1969)

[77] *Kerr's Catering v. DIR*, 57 Cal.2d 319 (1962)

You can discipline employees whose carelessness or simple negligence results in your loss. However, employers who threaten to discharge or discharge an employee for complaining about an illegal deduction may face a claim of violation of public policy and wrongful discharge.[78]

Dishonest or Willful Act or Gross Negligence

You may deduct from the employee's wages an amount sufficient to compensate for loss or damage resulting from gross negligence, willful misconduct or dishonesty. You may take such deduction from the employee's wages during employment and/or from the final check.

If you deduct from an employee's paycheck any amount believed to be the result of gross negligence, willful misconduct or dishonesty, the burden of proof is on you to establish the weight of evidence for the withholding. If you fail to meet the burden of proof, you will likely be subject to waiting time penalties.[79]

Any doubt as to your ability to prove misconduct is therefore best resolved in a small claims or other court proceeding against the employee, rather than a deduction from wages owed that employee.

Employee Loans

You may not deduct from an employee's final check any amount representing the unpaid balance of a debt owed by the employee, even though the indebtedness is contained in a written agreement to pay the full amount of the debt on demand, at termination or otherwise.

In *Barnhill v. Robert Saunders & Co.,*[80] a California Court of Appeals seemed to approve of deductions for loans for which the employee had given written consent. However, the opinion conflicts with Labor Code section 300. The Labor Code states that no assignment of future wages can be made unless they are assigned for necessities of life — food, clothing or housing. Furthermore, the assignment must be made to the person supplying the necessities. If the employee is married, assignment of wages requires spousal consent.

The DLSE has issued opinion letters on several types of deductions for employee loans and debts. The opinion letters rely heavily on court cases to deny deductions.

As a result of the updates made to the DLSE's manual, consider the following suggestions:

- If you loan money to an employee, require him/her to sign a promissory note guaranteeing repayment. Obtain the repayment by personal check or other form of payment — never through a payroll deduction.
- Discuss automatic enrollment in your 401(k) or other retirement plan with your benefits provider. Not all providers follow the automatic enrollment process.
- Review your policies and procedures about loans or advances, including advances on vacation and PTO, to ensure that you are not repaid by payroll deduction.

Deductions for Overpayment of Wages

You may not know the exact amount of hours that an employee worked in a pay period, for several reasons:

- The employee failed to turn in a time record

[illegible]

[illegible] Cal. App. 4th 563 (1998)

[illegible]

- The record was lost or misplaced
- The employee is absent or on leave

Employers will often pay an employee for the hours the employee was scheduled to work and address any overpayment at a later date.

Historically, employers may have made deductions in the next payroll period, either with or without the employee's written authorization to do so. Because of the Labor Commissioner's strict adherence to case law, as well as the Labor Code, this action involves risk.

The Labor Commissioner's office addressed a question about frequent overpayment and immediate deductions from the next payroll. Dated November 25, 2008, the opinion letter refers to many of the same cases that are discussed in previous topics. In the case in the opinion letter, the employer had a 75-hour payroll period. Payment was made prior to the end of the pay period. The employer paid for time that was scheduled to be worked, but might not have actually been worked.

The opinion letter noted that the overpayment was a result of the employer's policy of paying wages before the end of the pay period. The DLSE couldn't find anything in the law that prohibits an employer from making deductions if they are "predictable and expected wage overpayments made in the immediately prior paycheck that resulted from the employer's payroll system, if the employee provides voluntary, written authorization."[81] You cannot make deductions from the employee's final paycheck for overpayments, because you would face penalties under Labor Code section 203.

Do not rely upon DLSE opinion letters as legal precedent. Courts need not follow the opinions. If your payroll system pays employees before the end of the pay period, consult with legal counsel to determine how to handle any overpayments.

Unreturned Tools and Uniforms

The IWC Wage Orders provide that, in lieu of posting a bond, an employee can agree to a deduction from his/her last paycheck to cover the cost of tools, uniforms or other items you furnished that he/she did not return to you.[82] However, based on decisions of the California Supreme Court and a California Court of Appeal, you cannot make deductions without proving theft or culpable negligence, even where the employee signed an agreement authorizing the deduction.[83]

Cash Bonds and Deposits

You cannot demand cash bonds from an employee, unless the employee is entrusted with property of an equivalent value or the bond is in an amount equivalent to the value of goods, wares or merchandise periodically advanced to the employee.[84] If cash is received as a bond, the cash must be deposited in a savings account in a bank authorized to do business in California and may be withdrawn only upon the joint signatures of the employer and the employee.[85] You must return any money that was put up as a bond or deposit to the employee with accrued interest immediately upon return of the property.[86] You cannot commingle property put up as a bond with your property; this is viewed as theft under the Penal Code.[87]

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[81] DLSE Opinion Letter, 2008.11.25-1

[82] IWC Wage Orders sec. 9(c)

[83] *Barnhill v. Robert Saunders & Co.*, 125 Cal. App. 3d 1 (1981); [illegible] (1962); DLSE *Enforcement Policies and Interpretations Manual* sec. 11.2

[84] Lab. Code sec. 402

[85] Lab. Code sec. 403

[86] Lab. Code sec. 404

[87] Lab. Code sec. 405

Meals and Lodging

You can credit meals and lodging that you supply as part of an employee's compensation against state minimum wage obligations. Meals must include a variety of nutritious foods. Lodging must meet customary standards of adequacy and sanitation. You cannot deduct from the minimum wage for meals and lodging unless the employee authorized a deduction in writing and actually uses the meals and lodging. You cannot require employees to share beds.

If, as a condition of employment, the employee must live at the place of employment or occupy quarters you own or under your control, then you cannot charge rent in excess of the values listed in the following table.

New 2016

The minimum wage order limits the extent to which meals and lodging can be credited against the minimum wage. The meal and lodging credits increased on January 1, 2016 when the new minimum wage became effective.

Lodging	**Credit Amount as of January 1, 2016**
Room occupied alone	$47.03 per week
Room shared	$38.82 per week
Apartment — two-thirds of the ordinary rental value and in no event more than	$564.81 per month
Where a couple are both employed by the employer, two-thirds of the ordinary rental value and in no event more than	$835.49 per month

Meals	**Credit Amount as of January 1, 2016**
Breakfast	$3.62
Lunch	$4.97
Dinner	$6.68

Despite the IWC's dollar limit on rent, the law allows you to charge a resident manager of an apartment house up to two-thirds of the fair market rental value of the apartment supplied pursuant to a voluntary written agreement. You cannot use credit for the apartment to meet your minimum wage obligation to the manager.[88]

Garnishment Against Wages

Employers occasionally receive court orders garnishing an employee's paycheck for payment of child support or other debts. The law places limits on the percentage of wages that can be withheld, depending on the type of garnishment. You can deduct $1.50 from the employee's earnings for each payment made in accordance with any garnishment order.[89]

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88. Lab. Code sec. 1182.8

89. Code of Civ. Proc. sec. 706.034

The amount of wages exempt from garnishment is higher under the California standard than the federal standard.

Until 2016, a withholding order could not exceed the lesser of the following:

- 25 percent of an individual's weekly disposable earnings; or
- The amount by which the disposable earnings for the week exceed 40 times the state minimum hourly wage in effect.

Beginning January 1, 2016, a withholding order cannot exceed the lesser of:

- 25 percent of an individual's weekly disposable earnings; or
- 50 percent of the amount by which the disposable earnings for the week exceed 40 times the state minimum hourly wage in effect. If the debtor works in a location where the local minimum hourly wage is greater than the state minimum hourly wage, the local minimum hourly wage in effect at the time the earnings are payable must be used for the calculation.[90]

The law clearly defines "disposable earnings" as the portion of an individual's earnings that remains after deducting all amounts required to be withheld by law. You can download a copy of the order, along with instructions, at the California Courts website (http://www.courts.ca.gov/documents/wg002.pdf).[91]

Different limits apply for child support (50 percent of amount remaining after deductions).

If you receive a garnishment order, follow these general guidelines:

- Advise the employee of the court order and the date the first deduction will be made.
- Do not garnish a paycheck for more than the amount allowed by law. However, the courts enforce that limitation; you do not.
- Do not terminate an employee because his/her wages are garnished for the payment of one judgment.[92] A judgment against an employee is a single debt, regardless of the number of garnishments based on it. You can discharge employees for garnishments for multiple judgments other than child support. However, consult legal counsel before doing so.
- Keep a copy of the court orders in the employee's personnel file as the legal basis for making the payroll deduction.
- If an employee is subject to multiple garnishments, pay child support payments first.

Child Support

Your obligation to withhold child support owed by an employee pursuant to an appropriate order is even more extensive than the requirements about other garnishments.

> The law holds you responsible for your employees' child support obligations. You face severe penalties for noncompliance in some cases. You may become liable for the full amount of a child support claim filed against the employee plus interest, cost and penalties.[93]

The law requires each state to establish standard award guidelines and make child support payments as certain as tax payments through automatic wage deductions.

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[90] Code of Civ. Proc. sec. 706.050

[91] Code of Civ. Proc. sec. 706.011

[92] Lab. Code sec. 2929

[93] Family Support Act of 1988

Be aware of the following general provisions of this law:

- You can deduct and retain $1.50 from the earnings of the employee for each payment made pursuant to a Wage and Earnings Assignment Order for child support. This fee is in addition to the amount ordered to be withheld on the Wage and Earnings Assignment Order.[94] You cannot make retroactive deductions.
- The law prohibits job discrimination based on automatic child support withholding. You may open yourself to state and federal penalties if an applicant claims discrimination based on employment inquiries about child support obligations. An increase in payroll costs due to child support withholding is not a valid reason for rejecting an applicant.
- State and federal law prohibit terminating an employee for child support withholding, garnishment or threatened garnishment.
- For a former employee, the law requires that you provide, in writing, the employee's last known address and new employer's name and address, if known. You also must keep the order on file and honor its provisions if the employee returns to work.
- Although you need not notify the employee about the withholding notice, it is a sound practice. Advise the employee of the date the notice is received, the date withholding begins, the amount to be withheld and the requirement that you must comply with the order.
- You must comply with the child support withholding order as written until directed otherwise by the issuing agency or the court, even if the employee insists the withholding order is incorrect. Refer the employee to the local child support enforcement office to correct any inaccuracies.
- Child support claims take precedence over all other claims, except taxes. If the total amount to be withheld exceeds 50 percent of net disposable income, contact the state support enforcement agency for guidance.
- You must pay multiple child support garnishments in *pro rata* shares, with current support payments taking priority over past due support still owed. If the total amount exceeds the limit that state and federal laws exempt from a portion of the employee's wages or if out-of-state orders are involved, ask the local child support office for guidance. If you are a multistate employer, an order delivered to your representative in the issuing state but applicable to an employee working in another state binds you to the issuing state's laws.
- When you receive the child support order, mark the date received on the notice and retain the envelope with its postmark in case timely compliance becomes an issue. Federal law requires that withholding begin no later than the first pay period occurring after the mailing date of the notice. The wage withholding order requires delivery of the withheld child support within 10 days.
- You may stop child support withholding only upon order from the state's child support enforcement agency or the court. You must inform the appropriate agency if an employee subject to wage withholding leaves. You must resume withholding immediately upon the employee's rehire.

Establish a standard procedure for processing child support withholding and garnishment orders. Apply that policy consistently and include any confidentiality guidelines. In addition, because of the emotional nature of orders in some situations, train your payroll coordinator not only on law and compliance procedures, but also on organization policy for handling distressed employees.

For more information on child support wage garnishments, call the state Department of Child Support Services at (866) 901-3212. Additional information is available from the department's

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[94] Family Code sec. 5235(d)

"California Child Support: A Guide for Business," which can be downloaded at www.childsup.ca.gov/Portals/0/employer/docs/EmployerHndbk.pdf.

Penalty for Failure to Comply With Child Support Order

A court may order a child support garnishment to be paid by electronic transfer from the employer's bank account if the employer willfully fails to comply with the garnishment.[95] The court may also order an electronic transfer when the employer fails to comply with the garnishment on three separate occasions within a 12-month period, regardless of whether the failures were willful.

In addition, you may be subject to a civil penalty of up to 50 percent of the support amount not received, plus interest on the unpaid support.

The law imposes liability upon any person or business entity that knowingly assists a person who has an unpaid child support obligation to escape, evade or avoid current payment of those unpaid child support obligations. The penalty is three times the value of the assistance to have been provided, up to the total amount of the entire child support obligation due. The penalty will not apply if the unpaid obligation is satisfied. When an individual or entity knows of or should have known of the child support obligation, prohibited actions include:

- Hiring or employing a person who owes child support and failing to file a timely report of this employment to the Employment Development Department's (EDD) New Employee Registry
- Retaining an independent contractor who owes child support and failing to file a timely report of the engagement with the EDD
- Paying wages or other forms of compensation, including cash, barter or trade, that are not reported to the EDD

Timely Payment

In addition to paying the correct amount of compensation to employees, you are expected to pay it on time and in the manner required by law. Different rules apply to the routine payment of wages on regular paydays and the payment of wages when an employee resigns or is laid off or terminated. Adhere to these rules to avoid stiff penalties. For information regarding preparing final paychecks for employees see "Final Pay" in Chapter 29, page 900.

Regular Paydays

The California Labor Code is specific about the timing of wage payments and regularity of paydays. Striking employees' earned wages become payable in full on the next regularly scheduled payday.[96]

Paydays for Nonexempt Employees

For nonexempt employees, all wages for the normal work period come due and are payable at least twice each calendar month on days you designate in advance.[97] For an explanation of exempt and nonexempt status, see Chapter 4, "Exempt and Nonexempt." You must post a notice informing employees of paydays.[98]

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[95] Family Code sec. 5241
[96] Lab. Code sec. 209
[97] Lab. Code sec. 204
[98] Lab. Code sec. 207

You can also choose to pay employees weekly, biweekly or semimonthly with payment within seven days of the end of the pay period.[99] Paydays on a twice monthly schedule must be as follows:[100]

For work performed between:	Payment must be made by:
1st and 15th days of the month	26th day of the same month
16th and last day of the month	10th day of the next month

For employees who work in an industry involving work for several employers in the same industry interchangeably, the employers can establish a plan for the payment of wages in a central place and at a single time.[101]

Paydays for Exempt Employees

You must also pay exempt employees weekly, biweekly or semimonthly. They must be paid within the same time frames as nonexempt employees.

Salaries of executive, administrative and professional employees of employers covered by the FLSA can be paid once a month on or before the 26th day of the month. This paycheck must include the as yet unearned portion between the date of payment and the last day of the month.[102]

Payday Notice

You must post the day, time and place of the regular payday in your workplace.[103] As a convenience, the state provides a small form for this purpose. However, it is satisfactory to post this information in any understandable form. The payday notice is included as part of CalChamber's ***California and Federal Employment Notices Poster***.

No specific law requires a particular amount of advance notice to employees if you change your payday schedule. However, to avoid potential violations of payday laws, notify employees of the planned change at least one full payroll cycle in advance of the new schedule.

Timely Payment of Overtime Wages

Payment of overtime wages earned in one pay period can be delayed until no later than the payday for the next pay period. Only the payment of *overtime* wages can be delayed until the following pay period. *Straight-time* wages must be paid within the times set forth in the table located in "Paydays for Nonexempt Employees" on page 279.[104]

If you delay payment of overtime wages to the following pay period, you can itemize the hours as corrections on the pay stub for the period in which they are paid, if you identify the date of the pay period to which they are attributable.

Employer Closed on Payday

If you are closed on a payday that falls on a Saturday, Sunday or a holiday listed in the California Government Code, you can pay wages on the next business day.[105]

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[99] Lab. Code secs. 204, 204(b)

[100] Lab. Code sec. 204

[101] Lab. Code sec. 204(a)

[102] Lab. Code sec. 204

[103] Lab. Code sec. 207

[104] Lab. Code sec. 204

[105] DLSE *Enforcement Policies and Interpretations Manual* sec. 7.6

The following holidays are listed in the Government Code:

- January 1 — New Year's Day
- Third Monday in January — Martin Luther King Jr. Day
- February 12 — Lincoln's Birthday
- Third Monday in February — Washington's Birthday
- March 31st — Cesar Chavez Day
- Last Monday in May — Memorial Day
- July 4 — Independence Day
- First Monday in September — Labor Day
- Fourth Friday in September — Native Americans' Day
- Second Monday in October — Columbus Day
- November 11 — Veterans Day
- Fourth Thursday in November — Thanksgiving Day
- Day after Thanksgiving
- December 25 — Christmas
- Other days appointed by the governor for a public fast, thanksgiving or holiday

If a listed day falls on a Sunday, the following Monday is considered to be the holiday. If November 11, Veterans Day, falls on a Saturday, the preceding Friday is the holiday.[106]

State law does not require private employers to provide holidays. The payday exception applies only if the business is closed.[107]

Employee Failure to Complete Timecard

Even when an employee fails to turn in a record of time worked, you remain legally obligated to pay the employee on the established payday. The law does not allow you to require the employee to wait until the next payday or until he/she turns the timecard in to receive those wages.

You can still comply with this law even without a time record. Pay all wages due for the employee's normal work period — for example, 40 hours for a full-time employee — and defer payment of any overtime worked until the next regular payday.[108]

Though you cannot withhold wages as a penalty for failing to turn in a timecard, you can discipline the employee in other ways. You can treat failure to turn in a timecard as a violation of a work rule and penalize the employee with suspension, demotion or termination. Follow your own established disciplinary procedures.

Some employers use positive methods to remind employees to turn in timecards, such as a small bonus or party if all department members turn in their timecards on time for a calendar quarter.

For more information, see Chapter 12, "Hours of Work and Recording Time Worked."

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[106] Govt. Code sec. 19853(a)

[107] DLSE *Enforcement Policies and Interpretations Manual* sec. 7.6.2

[108] Lab. Code sec. 204

Expense Reimbursements

You must reimburse employees for all monies that they necessarily expend or lose, directly related to performing their duties or following your directions.[109]

Employers have long known that they need to reimburse such common expenses as work-related travel and dining expenses and mileage when an employee uses a personal car for work-related business. In extreme cases, reimbursement also includes compensating employees sued by third parties for conduct within the scope of employment.[110]

Employees can bring a lawsuit against employers who do not comply with this law in order to recover the amount of unreimbursed expenditures.

New 2016

The Labor Commissioner also has the authority to issue citations and penalties against employers that fail to reimburse employees for employer-required expenses.

IRS Mileage Rates

The 2016 rates were not available at the time of publication. For the most recent rate, visit the IRS website at www.irs.gov.

The 2015 standard mileage rates for the use of a car (also vans, pickups or panel trucks) are:

- 57.5 cents per mile for business miles driven
- 23 cents per mile driven for medical or moving purposes
- 14 cents per mile driven in service of charitable organizations

For the most recent rate, visit the IRS website at www.irs.gov. The mileage rate is based on the study of vehicle operating cost that is conducted annually for the IRS. It is considered the most reasonable reimbursement rate by California state agencies.

Employers may reimburse employees for mileage at or below the rate allowed by the IRS as long as the chosen rate covers all actual expenses incurred. Anything beyond the IRS rate may be taxable as wages if the chosen rate exceeds actual expenses. If an employer uses a lower mileage rate than the IRS rate, the employer must show that its rate sufficiently reimburses employees for their actual expenses.

Wage laws, such as those regulating the time and place of payment, do not apply to expense reimbursements. You can reimburse expenses on any reasonable schedule.

Required Cell Phone Use

In 2014, a California court of appeal ruled that an employer must reimburse an employee if the employee is required to use a personal cell phone to make work-related calls; this is true even when the employee did not incur an extra expense by making the work calls because he/she had an unlimited data plan.

The court ruled that “reimbursement is always required,” and the employer must pay “some reasonable percentage” of the employee’s cell phone bill to comply with the Labor Code.[111]

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[109] Lab. Code sec. 2802

[110] *Dougl* [illegible] *Los Angeles Herald Examiner*, 50 Ca [illegible]

[111] *Cochran v. Schwan’s Home Service, Inc.*, 228 Cal.App.4th 1137 (2014)

The case was brought by Colin Cochran on behalf of 1,500 customer service managers for Schwan's, a food delivery company. The lawsuit alleged that the managers were not reimbursed for expenses when they had to use their personal cell phones for work.

To prove liability, the court said that an employee only needs to show is that "he or she was required to use a personal cell phone to make work-related calls, and he or she was not reimbursed."

What constitutes a "reasonable percentage" is not a simple standard for employers to apply, and, unfortunately, the appellate court did not provide additional guidance.

The case is limited to situations where the employer requires an employee to use his/her personal cell phone for work-related calls. The case does not specifically address sporadic use by the employee because he/she wants to use a personal cell phone versus being required to use it.

The court of appeal allowed Cochran to continue with his class action lawsuit and sent the case back down to the trial court for further consideration. The California Supreme Court denied review of this case.

Training-Related Expenses

If the employer requires the employee to undergo a training course, the employer must generally reimburse the employee for the cost of the course.

Remember that you also must pay the employee for the time spent in training that is related to the employee's job. For more information regarding when training time counts as hours worked, see "Education and Training Time" in Chapter 12, page 315.

Some jobs require a specific type of license in order to legally practice in that field, such as real-estate agents, cosmetologists, registered nurses, attorneys and so forth. The Division of Labor Standards Enforcement (DLSE) distinguishes between training costs required by law, such as a license required by the state, versus employer-required training.

According to the DLSE:

- There is generally no requirement that an employer pay for training leading to licensure or the cost of licensure for an employee.
- If the license is required by the state or locality as a result of public policy, the employee bears the cost of licensing.
- If the license is not actually required by statute or ordinance but the employer requires the training and/or licensing simply as a requirement of employment, the employer must reimburse for the cost.[112]

You are not required to reimburse employees for the cost of the basic training required to obtain such licenses. But if you require specialized training in addition to the licensing requirements, you will need to reimburse the employee for those expenses.

For example, a California court case involving Los Angeles police officers highlights the issue of mandatory training and what must be paid for when, by law, the job requires a particular type of training, certificate or license.[113]

The City of Los Angeles requires all newly hired police officers to attend and graduate from the Los Angeles Police Academy. Police officers were required to sign an agreement stating that they intended to maintain employment with the Los Angeles Police Department (LAPD) for at least five years and would reimburse the LAPD for academy training costs if they left before then to work at a different law enforcement agency.

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[112] DLSE Opinion Letter No. 1994.11.17; DLSE Enforcement Manual section 29.2.3.4

[113] *In Re Acknowledgment Cases*, 192 Cal. Rptr. 3d 337 (2015)

The city successfully sued 40 former LAPD officers for violating the agreement. The officers appealed, arguing that the agreement to repay the training costs violated Labor Code section 2802, which requires an employer to reimburse employees for "all necessary expenditures incurred as a direct consequence of the discharge of their duties." The LAPD required all officers to attend its specific academy.

The city argued that because police officer training is mandated by law, the city was not obligated to pay for the expense. A POST (Peace Officers Standards and Training) certificate is required by California law before anyone can exercise the powers of a peace officer in the state.

However in addition to the mandatory POST requirements, the LAPD required 420 hours of "department required" training meant to address challenges specific to the City of Los Angeles.

The court held that this additional training was not required by statute or public policy but was instituted "purely to satisfy the needs of the city ... " As a result, the court held that the cost of the additional training was an expense the city must pay for and the agreement requiring repayment of training costs was invalid.

Form of Wage Payment

All paychecks must be payable in cash, on demand and without discount at some established place of business in the state, the name and address of which must appear on the paycheck. At the time the paycheck is issued and for at least 30 days after, sufficient funds or credit in the payroll account must exist for the paycheck's payment.[114]

Paying any wage with a check backed by insufficient funds is unlawful. The dishonored check constitutes evidence that you violated the law.[115] Payment by means of an insufficient check can subject an employer to waiting time penalties.[116] However, the Legislature did not intend absolute criminal liability for all cases of issuing paychecks with insufficient funds. In cases where insufficiency results from unforeseen or unpreventable circumstances, violation of the statute becomes excusable.[117] For more information on penalties for insufficient funds for payroll, see "Insufficient Paycheck Funds" in Chapter 10, page 231.

The law does not prohibit you from using an electronic transfer system, such as direct deposit, to transfer wages to a bank, savings and loan or credit union pursuant to an employee's voluntary choice and authorization. You cannot force employees to use a direct deposit system.[118]

Public employers, including California and all local governments, do not fall under provisions that establish time and form of payment.[119]

Payroll With Pay Cards or Debit Cards

Employers have long used prepaid debit cards to issue payroll. Employees without bank accounts will find the debit cards a secure, convenient and inexpensive means of accessing payroll without opening

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[illegible]

[illegible]

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a bank account or paying hefty check-cashing fees. For employers with international employees or vendors, the prepaid debit card can be a faster and less expensive alternative to traditional funds exchange options and can simplify the transfer of regular global payments. Finally, in some instances, you may even find prepaid debit cards a cheaper, simpler and more secure alternative to direct deposit.

Two DLSE opinion letters state that the use of payroll debit cards and money network checks does not violate the Labor Code so long as all of the following conditions are met:

- The receipt of payment in this manner is voluntary.
- Employees have other payroll payment options.
- There is no fee to use this form of payment at least once per pay period at a banking institution in California.
- The employee has immediate access to the funds.
- The employee has specifically authorized the form of payment.

Consult with legal counsel before implementing a payroll program using pay or debit cards.[120]

Itemized Wage Statement

California employers have a legal obligation to provide employees with specified information regarding their wages.

At the time wages are paid, you must provide each employee an itemized statement, in writing, that contains the following information:

- Gross wages earned
- Total hours worked (except salaried exempt employees)
- All deductions, including taxes, disability insurance and health and welfare payments
  - Deductions ordered by the employee can be aggregated and shown as one item
- Net wages earned
- The pay period's inclusive dates
- Name of the employee and last four digits of his/her Social Security number (SSN)
  - All employers can print no more than the last four digits of an employee's Social Security number on check stubs or similar documents. They can substitute some other identifying number.
- Name and address of employer or legal entity that is the employer
- All applicable hourly rates in effect during the pay period and the corresponding number of hours the employee worked at each hourly rate
- The number of piece rate units earned and any applicable piece rate, if the employee is paid on a piece rate basis[121]
  - For more information on piece rate requirements for the itemized wage statement see "Wage Statement Requirements for Piece Rate Workers" on page 286

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[120] DLSE Opinion Letters 2008.07.07 and 2008.07.07.2

[121] Lab. Code sec. 226

- Temporary service employers must also include the rate of pay and the total hours worked for each temporary services assignment. Licensed security services companies are specifically excluded from this law.

As described below, additional information must also be provided on the wage statement relating to mandatory paid sick leave. Moreover, if you employ certain types of workers you will also be required to provide additional information on the wage statement.

Wage Statement Requirements for Paid Sick Leave

California's mandatory paid sick leave law requires employers to provide employees with a written notice that sets forth the amount of paid sick leave available for use, or paid time off leave an employer provides in lieu of sick leave. Employers can provide the information on either:[122]

- The employee's itemized wage statement;
- A separate writing provided on the designated pay date with the employee's payment of wages.

New 2016

Employers with unlimited paid sick leave or paid time off policies can meet the payday notice requirement by indicating "unlimited" on either the itemized wage statement or the separate notice. With this type of policy, employees are not given a set number of days off but, instead, there is basically an honor system where employees can take time off whenever, and as often as, they like.

Employers in the broadcasting and motion picture industry covered by Wage Order 11 or 12 do not have to comply with the payday notice requirement until January 21, 2016.

For more information see Chapter 20, "Paid Sick Leave."

Wage Statement Requirements for Piece Rate Workers

Existing law requires that the itemized wage statement given to piece rate workers must include the number of piece rate units earned and any applicable piece rate.[123]

New 2016

Beginning January 1, 2016, wage statements given to piece rate employees must also contain the following specific information for each payroll period:[124]

- The total hours of compensable rest and recovery periods, the rate of compensation for those periods and the gross wages paid for those periods; and
- The total hours of nonproductive time, the rate of compensation for nonproductive time and the gross wages paid for such time.
  - You are not required to put this information on the pay stub if you pay for nonproductive time by paying a base hourly rate of at least the minimum wage for all hours worked, in addition to the piece rate. For more information, see "Compensation for Nonproductive Time" on page 252.

Wage Statement Requirements for Farm Labor Contractors

On the itemized payroll statement furnished to employees, employers that are farm labor contractors must disclose the name and address of all legal entities (for example, other growers or other farm labor contractors) that secured the employer's services.[125]

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[122] [illegible]

[123] [illegible]

[124] [illegible]

[125] [illegible]

Farm labor contractors have other legal requirements relating to notice of wages. For example, farm labor contractors must have available for inspection by employees or growers a written statement in English and Spanish showing the rate of compensation he/she receives from the grower and the rate he/she is paying to employees for services rendered to, for, or under the control of the grower.[126]

The statement has to be provided to a current or former employee or grower within 21 calendar days or the farm labor contractor can be subject to a $750 fine recoverable by the employee or grower.[127]

For more information on special rules relating to farm labor contractors visit the Department of Industrial Relations dedicated web page at http://www.dir.ca.gov/dlse/FLC.htm.

In addition, farm labor contractors, agricultural employers and agricultural associations that employ migrant or seasonal agricultural employees must include the employer's identification number assigned by the IRS.[128]

Recordkeeping Requirements

A copy of the itemized wage statement and the record of deductions must be kept for at least three years at the place of employment or at a central location within the State of California. You must make these records available for employee's inspection upon reasonable request. You must allow the employee to inspect and/or copy them.[129] For more information, see "Access to Payroll Files" in Chapter 8, page 146.

The copy an employer must maintain can be a duplicate of the itemized statement given to the employee or a computer generated record accurately showing all information required in the itemized statement.

Penalty for Knowing and Intentional Failure to Comply

A knowing, intentional failure to provide the itemized job statement information that results in an employee "suffering injury" entitles the employee to recover all actual damages or up to $50 for the initial pay period in which a violation occurs and $100 per employee for each violation in a subsequent pay period, up to a total of $4,000, plus costs and reasonable attorneys' fees.[130]

The Labor Code specifically defines when an employee is considered to have "suffered an injury" with regard to employer provided wage statements, subjecting the employer to the penalty.[131]

First, an employee will be considered to suffer an injury for purposes of the penalty if the employer fails to provide a wage statement at all to the employee.

Second, an employee will be considered to suffer an injury if the employer (1) fails to provide accurate and complete information (as specified, see "Itemized Wage Statement" on page 285); and (2) the employee cannot "promptly and easily determine" the following from the wage statement alone:

- The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement.
- Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period.
- The name and address of the employer and, if the employer is a farm labor contractor, the name and address of the legal entity that secured the services of the employer during the pay period.

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[126] Lab. Code sec. 1695(a)(5)

[127] Lab. Code sec. 1695(a)(5)

[128] 29 CFR sec. 500.80(d), Migrant and Seasonal Work [illegible]

[129] Lab. Code sec. 226

[130] Lab. Code sec. 226

[131] Lab. Code sec. 226(e)

- The name of the employee and only the last four digits of the employee's Social Security number or an employee identification number.

"Promptly and easily determine" means a reasonable person would be able to readily ascertain the information without reference to other documents or information.

The law also states that a "knowing and intentional failure" does not include an isolated and unintentional payroll error due to a clerical or inadvertent mistake. In determining whether an employer complied, a factfinder may consider whether the employer, prior to an alleged violation, has adopted and is in compliance with a set of policies, procedures, and practices that fully comply with this section.

Additional Penalties

If you do not provide the required statements to the employee in writing or if you fail to keep the above records for the required three years, you are subject to civil penalties of $250 per employee per violation for the first violation and $1,000 per employee for each subsequent violation.[132]

If you make a clerical error or inadvertent mistake on the first violation, the Labor Commissioner has discretionary power not to penalize you.[133]

Wage and Employment Notice

Nonexempt employees must also receive specific wage and employment information at the time of hire. For specific information, see"Providing Wage Information Upon Hire" in Chapter 3, page 41.

Wage and Employment Notice to Employees (Labor Code section 2810.5)

Wage and Employment Notice to Employees (Labor Code section 2810.5) - Spanish

You are generally required to notify employees, in writing, of any changes to wage information required by the notice within seven calendar days after the time a change was made. An exception exists if all of the changes are reflected in a timely itemized wage statement that meets all of the legal requirements or are reflected in another legally required writing within seven days of the changes.

The Labor Commissioner published a revised wage notice that contains information regarding paid sick leave. For more information see Chapter 20, "Paid Sick Leave."

Execution of Release on Account of Wages Due

You cannot ask or require an employee to forego wages due or "execute a release" of wages due. The phrase "execute a release" includes requiring an employee, as a condition of being paid, to sign a false statement of the hours he/she worked during a pay period. Employers who violate this law are guilty of a misdemeanor.[134]

Tools, Uniforms and Equipment

If you require specific uniforms, tools or equipment as a condition of employment, or if the law requires you to provide certain equipment, you must provide and maintain the uniforms, tools or equipment, regardless of how much the employee is paid. You cannot make deductions from an employee's wages for normal wear and tear. For more information on deductions, see "Deductions From Wages" on page 271.

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[132] Lab. Code sec. [illegible]

[133] Lab. Code sec. 226.3

[134] Labor Code sec. 206.5

A "uniform" is defined as wearing apparel and accessories of distinctive design or color. Clothing that is standard in the industry and can be worn from one job to the next is not considered a uniform. For example, you need not supply white nurses uniforms and black-and-white uniforms for food servers because these clothes are standard in their industries and can be used from one job to the next.[135]

You must pay for and maintain a uniform if it is not standard in the industry, even if it could be worn off the job as street apparel. For example, a restaurant with a tropical theme might ask servers to wear khaki shorts and any Hawaiian shirt. Although this might be appropriate street apparel, because it is not standard apparel for servers throughout the restaurant industry it would be considered a uniform.

When tools or equipment are necessary to perform the job, you must provide and maintain them. However, employees whose wages are at least two times the minimum wage can be required to provide and maintain hand tools and equipment customarily required by the trade or craft in which he/she works.[136]

Under California Division of Occupational Safety and Health regulations, you must provide all necessary safety equipment for employees, such as gloves and safety shoes.[137] Specific regulations require some employers to provide eye and face protection.[138]

Property Return Agreement

Work Facilities

If the job requires changing clothing, you must provide employees with all of the following:

- Rooms to permit clothing changes in reasonable privacy
- Lockers, closets or equivalent space for safekeeping of employees' clothing
- Change areas and lockers separated from toilet rooms[139]

For more information, see "Preparation Time" in Chapter 12, page 311.

You must maintain temperature levels consistent with industry standards for process and work. If the process involves high heat or humidity, take all reasonable steps to reduce this hazard. For more information, see "Implementing High-Heat Procedures" on page 627. If the process produces extreme cold — prevailing temperatures less than 60 degrees — you must furnish a room heated to at least 68 degrees to which employees can retire for warmth. Federal and state energy guidelines take precedence over temperature requirements.[140]

Suitable Seating

The majority of California's Wage Orders require "suitable seats when the nature of the work reasonably permits the use of seats." But questions remain as to how to apply this requirement, and there have been numerous class-action lawsuits involving the question of providing seats for employees to do their work.

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[135] IWC Wage Orders sec. 9

[136] IWC Wage Orders sec. 9; DLSE *Enforcement Policies and Interpretations Manual* secs. 45.5.7, 45.5.8 and 45.5.8.1

[137] Lab. Code sec. 6401

[138] 8 CCR sec. 3382

[139] IWC Wage Orders sec. 13

[140] IWC Wage Orders sec. 15

If work allows the employee to sit, you must provide suitable seats. If the work does not allow for sitting, you must provide seats close to the work area and permit employees to use them.[141]

If an employer fails to provide suitable seating, employees can sue under the Private Attorneys General Act of 2004.[142] For more information, see "Private Attorneys General Act (PAGA) Claims" on page 233.

In 2010, a California appellate court ruled that employees could seek monetary damages from their employer, the 99¢ Only Stores, for its alleged failure to provide "suitable" seating for employees, as required by California's Wage Orders.[143]

At issue in *Bright v. 99 Cents Only Stores* was an obscure provision of the Wage Orders — a requirement that employers provide "suitable seating" for employees. The complaint alleged that the employer's failure to provide "suitable seating" also violated California Labor Code section 1198, and sought to impose penalties for the violation under California's Private Attorneys General Act of 2004 (PAGA), (California Labor Code Section 2698, et seq). The appellate court ruled that the plaintiff had a right to pursue civil penalties under the PAGA.

In the weeks following Bright, another California appellate court issued a nearly identical holding in *Home Depot U.S.A., Inc. v. Superior Court of Los Angeles.*[144] In that case, the appellate court held that Home Depot employees could state a claim under the PAGA by alleging that the employer had not provided seating for its cashiers, even though there was ample space behind cashiers to allow for a stool or seat.

In 2014, the California Supreme Court said it will review questions related to the suitable seats requirement. Many employers, especially those in the retail industry, hope the court will provide much needed guidance in this murky area.

The questions before the court arise out of two class-action suits filed in federal court:

- *Kilby v. CVS Pharmacy, Inc.* involves CVS cashiers who spend almost all of their time standing at cash registers and ringing up sales; and
- *Henderson v. JPMorgan Chase Bank NA* involves bank tellers who also must spend a significant amount of time standing.

The Ninth Circuit asked the California Supreme Court to decide how it interprets California's suitable seating requirement. The Ninth Circuit underscored the fact that this interpretation will carry enormous consequences for California employers. If the interpretation ultimately imposes liability on employers, it will directly impact countless employers and employees and "mean thousands of California's employees would be entitled to seats."

The Ninth Circuit also noted the potential cost to employers:

> Even a conservative estimate would put the potential penalties in these cases in the tens of millions of dollars. See California Labor Code section 2699(f)(2) ("If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars ($100)

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[141] IWC Wage Orders sec. 14

[142] *Bright v. 99 Cent Only Stores*, 189 Cal. App. 4th 1472 (2010)

[143] *Bright v. 99 Cent Only Stores*, 189 Cal. App. 4th 1472 (2010)

[144] *Home Depot U.S.A., Inc. v. Superior Court*, 191 Cal. App. 4th 210 (2010)

> for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation.")

The California Supreme Court will answer the following questions:

- Does the phrase "nature of the work" refer to an individual task or duty that an employee performs during the course of his or her workday? Or should courts construe "nature of the work" holistically and evaluate the entire range of an employee's duties?
  - If the courts should construe "nature of the work" holistically, should the courts consider the entire range of an employee's duties if more than half of an employee's time is spent performing tasks that reasonably allow the use of a seat?
- When determining whether the nature of the work "reasonably permits" the use of a seat, should courts consider any or all of the following:
  - The employer's business judgment as to whether the employee should stand;
  - The physical layout of the workplace; or
  - The physical characteristics of the employee.
- If an employer has not provided any seats, does a plaintiff need to prove what would constitute "suitable seats" to show the employer has violated the Wage Order?

As of November 2015, this issue has not been resolved.

Wage and Hour Requirements for Specific Industries

This section discusses wage and hour requirements for specific jobs and industries.

Requirements for Government Contractors

If you do business with government entities, you must follow additional state and federal requirements for wages and benefits. Wages and benefits are often heavily influenced by collectively bargained rates.

Prevailing Wage Obligation

The Department of Industrial Relations defines the prevailing wage rate as the basic hourly rate paid on public works projects to a majority of employees engaged in a particular craft, classification or type of work within a locality and in the nearest labor market area. The prevailing wage obligation is imposed when you:

- Contract to provide materials, services or construction work under contracts with federal or state governments.
- Provide services or construction work for public entities.
- Participate in certain federally funded programs.

A prevailing wage obligation is virtually synonymous with the minimum wage obligation, although the amount you must pay as prevailing wages is generally significantly higher than the minimum wage. The principal difference is that prevailing wage legislation frequently requires the provision of both local prevailing wages and fringe benefits or payment of the costs of benefits.

Employers with public works contracts need to pay close attention to their prevailing wage obligations. Bidders on public works projects will also need to use the prevailing wage rate.

Federal Prevailing Wage Law

The U.S. Department of Labor established a minimum wage of for all workers on federal construction and service contracts. The wage applies to new contracts and replacements for expiring contracts with the federal government that result from solicitations issued on or after January 1, 2015, or to contracts that are awarded outside the solicitation process on or after January 1, 2015. The minimum wage under this rule will be indexed for inflation in future years.

New 2016

Beginning January 1, 2016, the minimum wage rate increased from $10.10 per hour to $10.15 per hour.

The final minimum wage requirement applies to:

- All contracts for construction covered by the Davis-Bacon Act
- Contracts for services covered by the Service Contract Act
- Concessions contracts, such as contracts to furnish food, lodging, automobile fuel, souvenirs, newspaper stands and recreational equipment
- Contracts to provide services, such as child care or dry cleaning, on federal property for federal employees or the general public

The Walsh-Healey Act covers employers with federal government contracts that manufacture or supply articles with a value of more than $10,000. Under this law, government contractors must pay prevailing wage rates in addition to conforming to the FLSA's requirements.[145] The Act requires these employers to pay the locally prevailing minimum wage as determined by the Secretary of Labor, but does not require payment of locally prevailing fringe benefits. The Walsh-Healey Act is enforced by the U.S. Department of Labor. Penalties for violations include liquidated damages to claimants and the possibility of being excluded from government work.

California employers with lawful alternative workweek schedules who work on federal contracts covered by the Walsh-Healy Act should carefully review the contracts for applicable overtime requirements.

The Davis-Bacon Act covers employers with federal government contracts in excess of $2,000. All laborers and mechanics engaged in the construction, alteration or repair of public work pursuant to such a contract must be paid an amount equal to the total of the locally prevailing minimum wage and fringe benefits as determined by the Secretary of Labor.[146] The Davis-Bacon Act covers the principal contractor and all subcontractors who work for the principal contractor.

State Prevailing Wage Laws

California imposes prevailing wage obligations upon employers who provide services or construction work for public entities under contract and in excess of $1,000.[147] You must maintain certified payrolls for public work performed. You must provide copies to the DLSE or the entity that awarded the contract within 10 days of written request.[148] The copies must include the names of employees and hours worked by day and week. You must also keep records open at reasonable hours for inspection by DLSE or the entity that awarded the contract.[149]

In many cases, the prevailing wage and benefits required by California public works projects are higher than those required by federal law. For example, California requires overtime after 8 hours of work in a day and 40 hours of work in a week on state public works projects.[150]

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[145] 41 U.S.C. 35 et seq.

[146] 40 U.S.C. 3142

[147] Lab. Code sec. 1771

[148] Lab. Code sec. 1812

[149] Lab. Code sec. 1812

Work that is performed by a volunteer, a volunteer coordinator, by members of the California Conservation Corps or members of a certified Community Conservation Corps are exempt from the prevailing wage requirement.[151]

A penalty per day per employee can be imposed for failing to pay prevailing wages or overtime on state jobs in California.[152] The penalty starts at $40 per day per employee unless the error is the result of a good-faith mistake that is promptly and voluntarily corrected. The minimum penalty increases to $80 per day per employee if the contractor has been subject to a penalty within the previous three years, and to $120 per day per employee if the Labor Commissioner determines that a willful violation occurred. When any amount is collected from a contractor, the amount will be applied first to satisfy any outstanding wage claim before it is applied to the penalty.[153] It is a misdemeanor to willfully fail to pay the prevailing wage.[154]

Charter cities are prohibited from using or receiving state funds or financial assistance for construction projects if the city has a provision authorizing a contract to not comply with prevailing wage provisions on any public works contract. The law applies to contracts or awards after January 1, 2014.[155]

In addition, the Labor Commissioner publishes a list of contractors and subcontractors that have committed willful violations or against which a final compliance order was issued. The list includes the date of each assessment, the amount of wages and penalties assessed and the amount collected. The list is updated quarterly. A name remains on the list until the date the assessment is satisfied or three years, whichever is later.

For more information on state prevailing wages, see the DIR website at http://www.dir.ca.gov/OPRL/faq_prevailingwage.html.

Committee Access to Payroll

California law permits a federally recognized joint labor management committee to obtain a copy of a certified payroll from a contractor on a public works project, with names and SSNs deleted (with an exception of allowing disclosure of last four digits in certain circumstances).[156] If the committee discovers unpaid prevailing wages or fringe benefits due and related penalties, the committee can file a civil action to collect them. Courts can award restitution to employees and attorneys' fees and costs to the committee.[157]

Confidentiality for Employees Reporting Violations

The DLSE is authorized to conduct investigations to determine if employers have violated state prevailing wage laws. During an investigation, the DLSE must keep confidential the name and other identifying information of any employee who reports a violation of prevailing wage laws.[158]

Requirements for Public Employers

Employees directly employed by the state or any county, incorporated city or town or other municipal corporation do not fall under provisions that establish time and form of payment.[159]

150. Lab. Code sec. 1815
151. Lab. Code sec. 1720.4
152. Lab. Code secs. 1775, 1813
153. Lab. Code sec. 1775
154. Lab. Code sec. 1777
155. Lab. Code sec. 1782
156. Lab. Code sec. 1776
157. Lab. Code sec. 1771.2
158. Lab. Code sec. 1736
159. Lab. Code sec. 220

Requirements for Seasonal Labor Outside of California

Seasonal laborers hired in California to work outside the state receive full protection of laws regulating the form and timing of payment that apply to people working in California. Seasonal laborers under California law include those hired to work outside of California for more than one month, excluding seamen and others covered by federal law.[160] For seasonal labor, the Labor Commissioner resolves all disputes about wage payment, though the courts can review these determinations.[161]

Requirements for Camps

Student employees of organized camps are not subject to the minimum wage for a 40-hour week, regardless of the number of hours the employee might work at the organized camp. If the employee works less than a 40-hour week, the employee must receive at least 85 percent of the minimum hourly wage for each hour worked. The organized camp can deduct the value of meals and lodging from the salary of student employees, pursuant to the appropriate IWC Wage Orders.[162]

"Organized camp" means a site with a program and facilities established for the primary purposes of providing an outdoor group living experience with social, spiritual, educational or recreational objectives for five days or more during one or more seasons of the year. It does not include a motel, tourist camp, trailer park, resort, hunting camp, auto court, labor camp or penal or correctional camp; nor does it include a child care institution or home-finding agency.[163]

Requirements for the Ski Industry

In 2000, the IWC amended Wage Order 10, Amusement and Recreation Industry, shortening the allowable regularly scheduled workweek and establishing a daily overtime requirement for the ski industry. For more information, see "Overtime and the Ski Industry" in Chapter 13, page 359.

Requirements for Labor Contractors in Specific Industries

Employers who contract for labor and services may be held liable if the labor contractor fails to pay its workers properly, fails to provide workers' compensation coverage or retaliates against workers for bringing complaints.[164] For more information, see "Leased Workers" in Chapter 6, page 89.

In addition, a contract or agreement for labor or services with a construction, farm labor, garment, janitorial, security guard or warehouse contractor violates the law if the contracting party knows or should know that the terms provide insufficient funds to allow the contractor to comply with all applicable local, state and federal laws or regulations governing the labor or services to be provided.[165] The laws cover a contract or agreement with any person, licensed or not, who acts in the capacity of a construction, farm labor, garment, janitorial or security guard contractor.

A contracting party knows that terms are insufficient if the party has the knowledge, arising from familiarity with the normal facts and circumstances of the business activity, that the contract or agreement does not include funds sufficient to allow the contractor to comply with applicable laws. A contracting party should know that terms are insufficient if the party has knowledge of any additional facts or information that would make a reasonably prudent person question if the contract or

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agreement contains sufficient funds to allow the contractor to comply with applicable laws. A failure to request or obtain any information from the contractor that is required by any applicable statute or by the contract or agreement constitutes knowledge of that information for purposes of this section.

In *Castillo v. Toll Bros., Inc.*, a court held that contractor liability under this section is limited to situations where the contractor pays subcontractors a contract price insufficient to allow payment of minimum wage.[166] The plaintiffs argued that contractors should be liable if the contracts do not permit payment of local prevailing wage. The court also held that the sufficiency of the contact should be tested by the total labor cost, which is the wage plus all legally required payments associated with employment, such as social security.

Labor Code Section 2810

The law presumes that a contract or agreement meets these requirements if the contract is a single written document that includes:

- The name, address and telephone number of the person or entity and the construction, farm labor, garment, janitorial or security guard contractor through whom the labor or services are to be provided.
- A description of the labor or services to be provided and a statement of when those services are to be commenced and completed.
- For state tax purposes, the employer identification number of the construction, farm labor, garment, janitorial or security guard contractor.
- The workers' compensation insurance policy number and the name, address and telephone number of the insurance carrier of the construction, farm labor, garment, janitorial or security guard contractor.
- The vehicle identification number of any vehicle owned by the construction, farm labor, garment, janitorial or security guard contractor and used for transportation in connection with any service provided pursuant to the contract or agreement; the number of the vehicle liability insurance policy that covers the vehicle; and the name, address and telephone number of the insurance carrier.
- The address of any real property to be used to house workers in connection with the contract or agreement.
- The total number of employees to be employed under the contract or agreement, the total amount of all wages to be paid and the date or dates when those wages are to be paid.
- The amount of the commission or other payment made to the construction, farm labor, garment, janitorial or security guard contractor for services under the contract or agreement.
- The total number of people who will be used under the contract or agreement as independent contractors, along with a list of the current local, state and federal contractor license identification numbers that the independent contractors must possess under local, state or federal laws or regulations.
- The signatures of all parties and the date the contract or agreement was signed.
- Any other provisions that may be required by regulations adopted by the Labor Commissioner.

If the information regarding number of workers employed or used as independent contractors under the contract is unknown at the time that the contract or agreement is executed, the best estimate available at that time is sufficient. If an estimate is used, the parties have a continuing duty to determine the information and put it in writing after that information becomes known.[167] A material change to the terms and conditions of a contract or agreement must be in writing in a single document. That document must contain all of the provisions affected by the change.

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[166] *Castillo v. Toll Bros., Inc.*, 197 Cal.App.4th 1172 (2011)

You must retain a copy of any contract or agreement for not less than four years following the termination of the contract or agreement.

Labor Code section 2810 does not apply to a person or entity who executes a collective bargaining agreement covering the employees who are employed under the contract or agreement. Labor Code section 2810 does not apply to a contract or agreement for labor or services to be performed in a residence if a family member of the contracting party resides in the residence for which the labor or services are to be performed for at least a part of the year.

An employee affected by a violation can bring an action for injunctive relief and file for damages to recover the greater of:

- All of his/her actual damages
- $250 per employee per violation for an initial violation
- $1,000 per employee for each subsequent violation

Labor Code Section 273

Applicants for licensing as a farm labor contractor, registration as a garment manufacturer, renewal or reinstatement of either or a change in the individuals licensed or registered must submit a statement as to whether the applicant has satisfied all requirements imposed by a final judgment, order or accord involving unpaid wages.[168]

Requirements for Foreign Labor Contractors

New 2016

Foreign labor contractors who recruit foreign workers for assignments in California must register with the Labor Commissioner by July 1, 2016, and meet registration, licensing and bonding requirements. For more information, see “Contracting for Foreign Workers” in Chapter 6, page 94.

Requirements for the Garment Industry

Garment manufacturers must register with the Labor Commissioner. They must take an examination covering the laws and regulations that protect employees in the industry.[169] Garment manufacturers must certify that they have a current workers’ compensation insurance policy in force for all employees.[170] The business name, address and registration number must be displayed at the entrance of the premises.[171] Those who manufacture garments by themselves, tailors solely engaged in alterations and employees who have wages as sole compensation are exempted from these garment manufacturing laws.[172]

Any garment manufacturer who contracts with any other garment manufacturer who is not registered with the Labor Commissioner is deemed the employer. This manufacturer is jointly liable with the contracting person for any workers’ compensation requirements violations.[173] The Labor

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167. Lab. Code sec. 2810(e)(2)
168. Lab. Code sec. 273
169. Lab. Code sec. 2675
170. Lab. Code sec. 2675(a)(4)
171. Lab. Code sec. 2676.5
172. Lab. Code sec. 2671
173. Lab. Code sec. 2677

Commissioner can revoke the registration of any garment manufacturer who fails to pay wages that the commissioner awarded to an employee.[174]

All garment manufacturers are liable for the guaranteed wages, including civil penalties, of the entity with whom they have contracted to make garments. A wage guarantee can be limited on a proportional share basis when the work of two or more people is performed at the same worksite.[175]

Employees can file a lawsuit to recover wages and overtime payments due from a manufacturer who has contracted with an unregistered manufacturer. Reasonable attorneys' fees and costs can be awarded.[176] The Labor Commissioner is authorized to confiscate garments if all wages due and owed have not been paid to employees performing the garment manufacturing during a period of 180 days prior to an investigation by DLSE.[177] If the Labor Commissioner has confiscated manufactured apparel due to labor violations in the previous five years, the Labor Commissioner is also authorized to confiscate manufacturing equipment (for example, sewing machines) that belongs to manufacturers who violated labor laws.

Failing to maintain wage and hour records on employees will result in a civil penalty of $100 for each affected employee on the first violation and $200 for subsequent violations.[178]

A garment manufacturer's failure to display his/her name, address and registration number at the front entrance of the premises will result in a civil penalty. The penalty for the initial citation is $100 per day for each calendar day that the person does not comply with the requirement. The fine increases to $200 per calendar day for subsequent violations.[179]

For more information regarding requirements for garment manufacturers, visit the DLSE website at http://www.dir.ca.gov/dlse/New_Garment_Manufacturers_and_Contractors.htm.

Requirements for Farm Labor Contractors

Farm labor contractors must be licensed by the state Labor Commissioner, take a written examination, post a wage surety bond based on annual payroll, and pay an annual license fee.

Failure to comply with licensing requirements may result in a penalty of $100 per person, per day, to $500 per person, per day.[180] Violation of farm labor contracts will result in stiff penalties. A violation of farm labor laws is also a misdemeanor punished by a fine of not more than $1,000, up to six months in jail, or both.

Farm labor contractors must pay employees' wages on payroll at least once every week on a business day designated in advance by the contractor. Payment on that payday must include all wages earned up to and including the fourth day before the payday.[181]

Upon request, farm labor contractors must provide growers a detailed payroll record of all wages and hours worked by farmworkers employed by the contractor.[182] For more information, see "Wage Statement Requirements for Farm Labor Contractors" on page 286.

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174. Lab. Code sec. 2673.1(m)
175. Lab. Code sec. 2673.1
176. Lab. Code sec. 2673.1
177. Lab. Code sec. 2680(a)
178. Lab. Code sec. 2678
179. Lab. Code sec. 2676.55
180. Lab. Code sec. 1683
181. Lab. Code sec. 205
182. Lab. Code sec. 1695.55

Agricultural employees and domestics can receive monthly pay if their employers lodge and board them. No two successive paydays can be more than 31 days apart, and the payment has to include all wages up to the regular payday.

Successor farm labor contractors are liable for wages or penalties owed by a predecessor farm labor contractor. The successor farm labor contractor will be liable only if it meets certain specified criteria, such as using substantially the same facilities or workforce and offering substantially the same services as the predecessor. An affirmative defense is available to the successor.[183]

The DLSE can enforce farm labor contractor requirements and go after violators. There are specific wage and hour reporting requirements, bonding requirements, written examination and licensure requirements, and penalties for violations.

There are also specific provisions aimed at addressing concerns regarding sexual harassment of migrant farm workers. The law, among other things, requires sexual harassment prevention training, places restrictions on the ability to grant a license to a farm labor contractor who has engaged in sexual harassment, and changes the mandatory written examination process to include a component on sexual harassment prevention. For more information, see "Farm Labor Contractors - Harassment Prevention Training Requirements" in Chapter 27, page 794.

Farm labor contractors are subject to detailed rules regarding working conditions. Employers in this industry should consult legal counsel with any specific questions.

For more information regarding farm laborer contractor requirements, visit the DLSE website at http://www.dir.ca.gov/DLSE/FLC.htm.

Requirements for Fishing Crews

Crew members on a licensed commercial passenger fishing boat are subject to the minimum wage.[184] At your option, the minimum wage obligation can be satisfied by paying employees according to the following formula:

- A one-half day trip (maximum of 6 hours of work) = no less than 6 times the hourly minimum wage.
- A three-quarter day trip (maximum of 10 hours of work) = no less than 10 times the hourly minimum wage.
- A full-day trip (maximum of 12 hours of work) = no less than 12 times the hourly minimum wage.
- An overnight trip (maximum of 12 hours worked within no less than 24 hours) = no less than 12 times the hourly minimum wage.

You must record hours worked in excess of this formula on the employee's pay record as additional hours worked. A crew member on a commercial passenger fishing boat on an overnight trip must receive no less than 8 hours of work during each 24 hour period. For information on overtime requirements for the fishing industry, see "Overtime and Commercial Passenger Fishing Boats" in Chapter 13, page 359.

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[183] [illegible]

[184] [illegible]

Requirements for Sheepherders

The minimum wage for sheepherders is $1,777.98 per month. You cannot offset wages paid to sheepherders by meals or lodging you provide.[185]

Wage Order 14, Agricultural Occupations, contains additional changes to California's employment laws relating to sheepherders' wages, hours, breaks, housing, tools and working conditions.[186]

Requirements for Motion Pictures

An employer who lays off an employee engaged in the production of motion pictures, whose unusual or uncertain terms of employment require special computation to determine the amount due, can pay that employee's final wages on the next regular payday following the layoff. A "layoff" means the employee retains eligibility for employment with that employer. If an employee is discharged, payment of wages must be made within 24 hours after discharge, excluding Saturdays, Sundays and holidays. "Discharge" means the unconditional termination of the employee's employment. You can mail payment. The mailing date is considered the payment date.[187]

Requirements for Curing, Canning or Preservation of Fruits, Fish or Vegetables

An employer who lays off a group of employees because of seasonal employment in the curing, canning or preservation of fruits, fish or vegetables must pay all earned but unpaid wages within 72 hours. You can mail payment to employees who request it and who provide a mailing address.[188]

Under the terms of this limited exception, payment is timely if you mail wages within 72 hours of the termination, regardless of when they are received.[189]

Requirements for Oil Drilling

An employer in the oil drilling business who lays off an employee or group of employees must pay all wages and accrued vacation due 24 hours after termination excluding Saturdays, Sundays and holidays. If you mail payment, the mailing date is considered the payment date.[190]

Requirements for Mining, Logging and Refining

In California, the mining industry must make a deposit of cash or negotiable securities equal to the wages coming due on the next payday.[191] This covers logging camps and all mining and refining industries, unless they have a free and unencumbered title to real property in California with a value at least equal to wages coming due.[192] Logging industries and sawmill operators can meet this requirement by posting a bond from a surety organization in California. Cash or securities used to meet wage requirements cannot be mingled with other assets or used to meet other obligations. The petroleum industry is not governed by this law.

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Requirements for Sales

Enterprises employing telephone or door-to-door salespeople and having no fixed place of business in California must give security for wage obligations of one payday or one four-week period, whichever is longer.[193] This can be a deposit of cash or securities that can be easily sold. It can also take the form of a certificate of deposit payable to the Labor Commissioner or a bond issued by a licensed California surety organization.

Requirements for Theater, Radio and Television

Theater, radio and television enterprises must deposit cash or readily marketable securities sufficient to meet obligations on a single payday. This covers most businesses in which people receive payments for performing.[194]

All deposits must be placed in a bank or trust company located in the county where employment takes place. Failure to make the deposit or otherwise post required security for wages constitutes a misdemeanor.[195] You must also conspicuously post notice of the place where required deposits have been made.[196] Failure to post a notice is sufficient evidence that an employer has not made required deposits.

Requirements for Domestic Service

Federal and state laws both affect the obligations of private households who have domestic work employees — and also agencies that provide such in-home helpers.

The California "Domestic Worker Bill of Rights" law added new sections to the California Labor Code — sections 1450 to 1454. As discussed below, it provides for specific overtime pay for certain in-home employees.

The federal Department of Labor also created new rules relating to overtime exemptions.

Employee or Independent Contractor?

To determine whether a household worker is covered by wage and hour laws, a home employer must first determine whether the worker at issue is categorized as an employee or an independent contractor. If the work involved is legitimately that of an independent contractor, the home employer likely will not have obligations under the laws discussed below. Examples of independent contractors are persons who take care of a lawn using their own tools, hire helpers as necessary and care for a number of other lawns. See "Independent Contractors" in Chapter 6, page 96, for more information on determining whether a worker is an employee or an independent contractor.

If the homeowner exercises control as to what is done and how it is done, the worker will likely be an employee. Common examples of household employees are maids, housekeepers, cooks, babysitters, butlers, caretakers and drivers. If a home employer hires employees, the employer must comply with the following labor laws.

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[193] Lab. Code sec. 170.6

[194] Lab. Code sec. 271

[195] Lab. Code secs. 270, 271

[196] Lab. Code sec. 272

Household Occupations and Wage Order 15

Services performed by employees of a private householder that are related to the care of persons or the maintenance of a private household or its premises are considered household occupations under Wage Order 15. These occupations can include, butlers, companions, cooks, house cleaners, maids, practical nurses, and valets.

Household occupations under Wage Order 15 are generally subject to minimum wage and overtime.

Previously, Wage Order 15, generally exempted certain personal attendants from overtime and other wage and hour rules. Minimum wage rates still applied. Under the new Domestic Worker Bill of Rights, however, overtime is now extended if the employee is a "domestic work employee who is a personal attendant."

This Wage Order must be carefully reviewed in connection with the Domestic Worker Bill of Rights.

California's Domestic Worker Bill of Rights

The Domestic Worker Bill of Rights became effective on January 1, 2014, and will remain in effect until January 1, 2017, at which time the California legislature will decide whether to renew it.

Under the Domestic Worker Bill of Rights a "domestic work employee who is a personal attendant" will be eligible for overtime at one and one-half times the employee's regular rate of pay if the employee works more than nine hours in any workday or more than 45 hours in the workweek.[197] (Note that this rule differs from California's normal overtime rule which requires nonexempt employees to be paid overtime for work in excess of eight hours in a workday or 40 hours in a workweek.)

The overtime provision applies only if a worker qualifies as both a "domestic work employee" and a "personal attendant."

"Domestic work employee" is defined as "an individual who performs domestic work and includes live-in domestic work employees and personal attendants."[198]

Excluded from the definition of domestic work employee are:[199]

- Workers in specified family relationships with the employer (any person who is the parent, grandparent, spouse, sibling, child, or legally adopted child of the employer)
- "Casual babysitters" for a minor child and babysitters under 18 years of age.
  - Casual babysitters are individuals whose employment is irregular or intermittent and whose vocation is not babysitting, unless the individual performs a significant amount of work other than supervising, feeding, and dressing a child the exemption does not apply.
- Workers who perform services through the In-Home Supportive Services program
- Workers employed by certain licensed health facilities as specified in Health and Safety Code section 1250
- Workers employed pursuant to voucher programs connected with regional centers or the state department of Developmental Services

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[197] Lab. Code sec. 1454

[198] Lab. Code sec. 1451(b)(1)

[199] Lab. Code sec. 1451(b)(2)

- Workers who provide child care and are exempt from licensing requirements found in the Health and Safety Code

A "personal attendant" is defined as any person who is employed by a private householder or by any third-party employer recognized in the health care industry to work in a private household to "supervise, feed, or dress a child, or a person who by reason of advanced age, physical disability, or mental deficiency needs supervision."[200]

A worker qualifies as a personal attendant when he/she spends at least 80 percent of total weekly work in the household on such tasks.[201]

Non-personal attendant related duties cannot exceed 20 percent of the total weekly hours worked.

If the employee meets *both* the domestic worker and personal attendant definitions, the employee will be entitled to overtime. If the employee does not meet the specified definitions of domestic worker and personal attendant found in the Domestic Worker Bill of Rights, the employee may remain exempt from overtime under the personal attendant exemption found in Wage Order 15.

Employers in this industry will need to carefully determine whether the Domestic Worker Bill of Rights applies to them. The law contains many specific definitions and exclusions. Employers should also pay close attention to the implementation of the Department of Labor's new rules in 2015 and remember that when both federal and state law apply, the employer must follow the most restrictive law.

Federal Domestic Service Rules

In 2013, the Department of Labor (DOL) issued a Final Rule amending regulations regarding domestic service employees to extend Fair Labor Standards Act (FLSA) protections to most home care workers. The rule was intended to go into effect on January 1, 2015.

New 2016

However, key provisions of the Final Rule were challenged in the federal courts. In August 2015, the DOL succeeded in an appeal, and the DOL began enforcing the rule on November 12, 2015. However, from November 12 through December 31, 2015, the DOL indicated that it will use its discretion in bringing cases. The DOL will provide technical assistance to states and other entities as it implements the Final Rule.[202]

More information on federal minimum wage and overtime for these workers can be found on this DOL Home Care webpage at http://www.dol.gov/whd/homecare/.

California already extends minimum wage coverage to companions, as defined by the FLSA, and has provisions extending overtime to certain categories of workers providing in-home care. However, there may be instances where the federal provisions provide more protection and therefore apply.

Employers with specific questions regarding the payment of home health workers or other domestic workers and regarding the interaction of California and federal law are advised to seek assistance of labor and employment counsel.

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[200] Lab. Code sec. 1451(d)

[201] Lab. Code sec. 1451(d)

[202] *Home Care Ass'n of America v. Weil*, 2015 WL 4978980 (D.C. Cir. 2015)

Workers' Compensation and Domestic Service Employees

Domestic service employees generally are covered by California workers' compensation laws, unless those employees are casual workers employed less than 52 hours and earning less than $100 during a 90-day calendar period before the injury that is allegedly subject to workers' compensation.[203] For more information, see Chapter 25, "Workers' Compensation."

Immigration and Domestic Service Employees

Household employees also may be subject to the Immigration Reform and Control Act (IRCA), which makes it unlawful for a person to hire an individual who is not lawfully admitted to work in the United States and who fails to comply with the employment verification procedures set forth in that law.[204] For further important information concerning employer requirements under this law, consult Chapter 5, "Verifying Eligibility to Work."

Requirements for Ambulance Companies

Ambulance drivers and attendants who are scheduled for 24-hour shifts can agree, in writing, to exclude from their daily hours worked no more than three meal periods of not more than one hour each. They can also exclude a regularly scheduled uninterrupted sleeping period of not more than eight hours. If they agree to this arrangement, daily overtime provisions do not apply. The employer must provide adequate sleeping and eating facilities.[205] Wage Order 5, Public Housekeeping Industry, and Wage Order 7, Mercantile Industry, require employers to provide adequate dormitory and kitchen facilities in these circumstances.[206]

Requirements for the Car Wash Industry

Every employer in the car wash and polishing industry must register annually with the Labor Commissioner.[207] Registration cannot be completed until all of the following conditions are satisfied:

- Employers must show proof of compliance with the local government's business licensing or regional regulatory requirements.
- A surety bond issued by a surety company admitted to do business in California is obtained and filed with the Labor Commissioner. The principal sum must be not less than $150,000. The bond must be payable to the people of the state of California for the benefit of any employee damaged by his/her employer's failure to comply with employment laws and regulations.
- A current workers' compensation insurance policy is in effect and documented.
- Registration fees of $250 for each branch location are paid. This amount can be adjusted for inflation.

The bond amount is $150,000. However, the law exempts an employer from the bond requirement if it has a collective bargaining agreement in place that expressly provides for all of the following:

- Wages
- Hours of work

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[203] Lab. Code [illegible]

[204] 8 U.S.C. [illegible]

[205] DLSE [illegible] Opinion [illegible]

[206] IWC Wage Order [illegible]

[207] Lab. Code secs. 2050-2067

- Working conditions
- An expeditious process to resolve disputes concerning nonpayment of wages

The application for registration requires extensive information on the company's ownership, and financial and legal history.[208] Proof of registration shall be by an official DLSE registration form. You must post the registration form where it can be read by the employees during the workday.

The penalty for failure to register is $100 for each day of unregistered operation to a maximum of $10,000.[209]

Every car wash employer must keep accurate records for three years showing all of the following:

- The names and addresses of all employees engaged in rendering actual services for any of the employer's businesses
- The hours worked daily by each employee, including the times the employee begins and ends each work period
- All gratuities received daily by the employer, whether received directly from the employee or indirectly by deduction from the wages of the employee or otherwise
- The wage and wage rate paid each payroll period
- The age of all minor employees
- Any other conditions of employment

Detailed information on registration requirements for this industry can be found at www.dir.ca.gov/dlse/Car_Wash_Polishing.htm.

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[208] Lab. Code sec. 2061

[209] Lab. Code sec. 2064

Hours of Work and Recording Time Worked

This section discusses another important element when paying employees — hours worked. Laws governing hours of work come from three sources: the federal Fair Labor Standards Act (FLSA), the California Labor Code and Industrial Welfare Commission (IWC) Wage Orders.

This section explains federal and state requirements about limitations on work hours. It also discusses how to determine which laws to follow when federal and state laws conflict. Topics include:

- Work hours for specific occupations
- Meal and rest periods
- Time off between shifts and days off
- Exceptions for specific industries

This section includes important, updated guidance on meal and rest periods based on the California Supreme Court's decision in *Brinker Restaurant Corp. v. Superior Court.*[1]

This section includes a section dedicated to time keeping and recording guidelines to help protect you from penalties.

Read this chapter in conjunction with applicable sections of Chapter 13, "Overtime," and Chapter 4, "Exempt and Nonexempt," because both contain important information on payment for hours worked in excess of the regular work week. In addition, Chapter 14, "Alternative Workweek Scheduling," contains information on how to modify the effect of the maximum hours laws discussed in this chapter.

Hours

California laws and Wage Orders contain many provisions about the hours employees can work, including meal and rest periods. The laws also specify when break time must be paid and when it can be unpaid. If you fail to comply with these laws, you will be subject to penalties. These penalties can increase your compensation costs for nonexempt employees by as much as 20 percent.

Maximum Hours of Work

Employees who work under Wage Order 4, Professional, Technical and Clerical; Wage Order 8, Industries Handling Products After Harvest; or Wage Order 13, Industries Preparing Agricultural Products for Marketing, On the Farm generally cannot be required to work more than 72 hours per week. The other Wage Orders contain no limitation on working hours.

Other laws place limits on workweek hours of work for certain types of employees, such as minors, truck drivers and health care employees. For more information, see "Working Hours for Minors" in Chapter 7, page 125, "Overtime in Transportation" in Chapter 13, page 358, and "Alternative Workweek Schedules and Health Care" in Chapter 14, page 374. There are also limitations for pharmacy personnel, railroad personnel and some mining-related occupations and underground workings. For more information, see "Exceptions for Specific Industries" on page 335.

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[1] *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012)

Minimum Hours of Work

Existing law does not specify a minimum number of hours for which an employee must be *regularly* scheduled each shift, unless employees voted to adopt an alternative workweek agreement. All Wage Orders except 16 require a 4-hour minimum shift for alternative workweek schedules. For more information on minimum shift requirements in alternative workweek schedules, see "Creating an Alternative Workweek Schedule" in Chapter 14, page 362.

You can schedule an employee for a recurring one-hour shift to attend a training meeting or to provide additional coverage during the lunch rush at a restaurant. In these circumstances, the employee would be entitled to just one hour's pay. However, each Wage Order contains Section 5, Reporting Time Pay, which requires pay for specified minimum hours if an employee:

- Reports to work on a regularly scheduled day and is allowed to work less than half his/her scheduled or normal shift
- Is called in on a nonscheduled day to attend a meeting or other duties
- Is recalled back to work after completing a shift. For more information, see "Reporting Time Pay" in Chapter 11, page 265, and "On-Call and Standby Pay" in Chapter 11, page 268.

Mandatory Days Off

Generally, every employee is entitled to at least one day off in a seven-day workweek.[2] An employee can accumulate rest days when the nature of employment requires him/her to work seven or more consecutive days. However, the employee must receive rest days equivalent to one day in seven during each calendar month.[3]

This requirement does not apply to emergencies, agricultural work, work performed in the protection of life or property from loss or destruction,[4] or when hours worked do not exceed 30 in any workweek or 6 in any workday.[5]

This is a separate provision from the weekly overtime requirements. For more information, see "Understanding Basic Overtime Requirements" in Chapter 13, page 341.

New 2016

The Ninth Circuit asked the California Supreme Court to answer three questions related to the "seventh day of work" rule. These questions are important for California employers and could conceivably affect how employers schedule employees.

The California Supreme Court has agreed to review the following questions:[6]

Question 1: Is the required day of rest calculated by the workweek or is it calculated on a rolling basis for any consecutive seven-day period? This question is important because it's likely that most employers currently use the workweek approach. Take the following example from the case before the Ninth Circuit.

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[2] Lab. Code secs. 551, 552

[3] Lab. Code sec. 554

[4] Lab. Code sec. 554

[5] Lab. Code sec. 556

[6] *Mendoza v. Nordstrom Inc.*, 778 F.3d 834 No. 12-57130 (9th Cir. 2015); NoS224611 (Cal.Supreme Court)

An employer's workweek begins each Sunday and schedules a full-time employee to work as follows:

Sun	**Mon**	**Tues**	**Weds**	**Thurs**	**Fri**	**Sat**
Off	Work	Work	Work	Work	Work	Work
Work	Work	Work	Work	Work	Work	Off

If the law applies to any consecutive seven days, the employer has violated it. If the law applies to each workweek, the employer has not violated it.

Question 2: How does the exemption for part-time employees work? The Labor Code exempts employers from providing a day of rest "when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof." The Ninth Circuit wants to know if that exemption applies "when an employee works less than six hours in *any one day* of the applicable week, or does it apply only when an employee works less than six hours in *each day* of the week?" (emphasis added)

Question 3: The Labor Code states that no employer "shall cause his employees to work more than six days in seven." The question here relates to what the word "cause" means: "**What does it mean for an employer to 'cause' an employee to work more than six days in seven: force, coerce, pressure, schedule, encourage, reward, permit, or something else**?" For instance, what if an employee chooses to work an extra shift? Is that OK?

Due to the uncertainty of these issues pending resolution by the courts, employers with questions regarding calculation of the seventh day of work should consult an attorney.

Minimum Time Between Shifts

Existing law does not specify a minimum time between an employee's shifts. There are a few safety-related exceptions noted elsewhere; for example, train crews and drivers regulated by the Department of Transportation. You can schedule an employee for a double shift, where a second shift immediately follows the end of an employee's first shift. However, carefully consider the impact of long hours of work on the health and safety of that employee and all others.

If more than one hour passes between shifts in a workday, you may be required to pay a split shift premium. For more information, see "Split Shift Pay" in Chapter 11, page 263.

Travel Time

Employers are often confused as to whether they must pay nonexempt employees for time traveling to, and attendance time at, a work-related function.

Although travel from home to work and back is usually not compensable,[7] most other travel time is considered work time. However, if a nonexempt employee is driving a company vehicle on his/her commute and you ask the employee to deliver tools and equipment to a worksite, the commute time may be compensable.

You must pay nonexempt employees for any time they are suffered or permitted to work — in other words, if they are there because you require them to be there, you must pay them. If you require nonexempt employees to attend a conference away from their typical work place, you must pay them for the travel time to and from the conference, minus the time of their usual commute.

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[7] 29 CFR sec. 785.35

If air travel is required, you must pay them (subtracting their usual commute time) from the time they leave their house until they reach their destination, or until they no longer perform work (e.g., they have checked into the hotel). If they are free to do what they choose — sightsee, etc. — your obligation to pay ends. If they go straight to the conference, you continue to pay.

Nonexempt employees must also take meal and rest breaks — even when traveling. Employees must keep an accurate account of their time when traveling to make sure overtime is properly calculated.

Because traveling does not require the employee to employ his/her skills, pay for travel time can be at a rate of pay less than the employee's normal rate of pay. You can pay the employee as little as the minimum wage for travel pay. Travel time is counted as work time and overtime pay may be due for travel. For more information on calculating the overtime rate when two or more rates of pay apply, see "Calculating Overtime" in Chapter 13, page 345.

If travel time pay is less than the employee's normal earnings, outline this difference to all employees in advance, preferably as part of your personnel policy. You must reimburse the employee for all out-of-pocket travel expenses.

The following examples demonstrate how nonexempt employees required to travel in the course of conducting their work would be paid:

- If an employee reports to the regular workplace and is then required to travel to another site to work for the day, you must pay travel time to the assigned workplace.[8]
- When an employee is required to report to a worksite other than the regular site and goes directly to that site without first going to the regular site, you must pay the employee travel time for any time in excess of the employee's normal commute time to and from the regular site.[9]
- If employees are required to travel to a distant work place, travel time pay will be incurred. For example, an employee works eight hours at his/her regular work place in Sacramento, then goes to the airport for a flight to Los Angeles. The employee stays at a hotel. The next day, he/she works six hours at the assigned work place in Los Angeles, finishing his/her work assignment. Then, he/she returns to Sacramento. Under these circumstances, the employee must receive his/her regular pay for the first eight-hour period. Travel pay begins when he/she leaves the work place to go to the airport. It ends when the employee arrives at the Los Angeles hotel. The employee receives his/her regular six hours of pay while at the work place in Los Angeles. When the employee leaves the Los Angeles work place for the airport, travel pay begins. It ends when he/she arrives at the Sacramento airport, if the commute time from the airport to home is the same or less than the employee's normal commute time from work to home. If the airport to home commute time is more than the employee's regular work to home commute, the employee must be paid for any excess time. The employee would also be entitled to reimbursement for mileage in excess of his/her regular commute.

If travel time is paid at a different rate of pay and the employee's travel and work time exceed eight hours in a workday, the employee must receive travel pay at 1.5 times the weighted average of his/her regular pay rate and the travel time rate, if any.[10] For more information, see "Calculating Overtime" in Chapter 13, page 345.

Accurate record keeping is imperative when calculating travel pay. Communicate with nonexempt employees about travel pay obligations. When employees travel to a different time zone, require them to track all hours based on California time. Doing so makes the math a lot easier and your payroll people will sincerely appreciate it. Consistent communication by email or phone can also cut down on disputes about hours actually worked.

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[8] 29 CFR sec. 785.3[illegible]

[9] 29 CFR sec. 78[illegible]

[10] 29 CFR sec. 785.39, 778.[illegible]

In addition to paying for travel time spent traveling, remember that employers must reimburse employees for expenses incurred as part of their job.

Commute Time Compensable in Certain Circumstances

California employers do not typically have to pay employees for time spent commuting to work. Over the past several years, however, courts identified circumstances in which California employers must pay employees for their time spent commuting.

Employers that greatly restrict an employee's commute time in a company car may have to compensate the employee for that travel time.

Example 1: In *Rutti v. Lojack Corp., Inc.*, the employer provided automotive service technicians with company cars to drive between clients. The technicians drove the cars home at the end of each day. The employer did not pay the technicians for time they spent commuting in the company car, and one of the technicians sued, seeking compensation for the unpaid time.

The restrictions on the technician's commute included:

- He was required to drive a company vehicle.
- He could not use the company vehicle for personal errands.
- He could use the company vehicle only to drive to and from his jobs.
- He could not transport any passengers.
- He had to have his cell phone turned on at all times, but could not use his cell phone while driving, except for company business.

In addition, the technician was given a computerized schedule that determined his first assignment of the day and the order in which he was to complete his jobs. Based on the restrictions and the schedule, the court ruled that the technician was under the control of his employer from the time he left home in the company vehicle for his first job until he arrived home at the end of the day, and the commute time was compensable.[11]

Example 2: In *Alcantar v. Hobart Service*, a court ruled that an employee might be under the control of an employer when the employee takes a company truck home because the employer lacked adequate parking space.[12]

The case involved service technicians who provided services on-site and drove company-issued trucks that contained tools and parts necessary to make repairs. A technician sued, claiming he should be compensated for normal commute time between his home and the branch office where he was assigned.

The court refused to dismiss the technician's claim, noting that commute time is compensable if the employee is subject to the employer's control.

Here, the court identified several facts that indicated the company exercised control over the technician during his normal commute:

- The technician was permitted to leave the company truck at his assigned branch, but there was not enough secured parking to accommodate all of the technicians' trucks;
- Per company policy, technicians were responsible if tools were lost, misplaced or not available at the time of inventory — meaning secured parking was important;

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[11] *Rutti v. LoJack, Inc.*, 596 F.3d 1046 (9th Cir. 2010)

[12] *Alcantar v. Hobart Service*, 800 F.3d 1047 (9th Cir. 2015)

- The company expected technicians to answer company-issued cell phones during commute time;
- Technicians could not use the trucks for personal use or for carrying passengers; and
- Technicians could not store or carry alcohol in the truck at any time.

According to the court, these facts could lead a jury to determine that the technician did not voluntarily commute in the company truck and was therefore entitled to compensation for all of the time he spent driving the truck to and from his home, even if it fell within his normal commute.

The Ninth Circuit directed the trial court to allow the technician's claim to go to a jury to decide whether the company, in fact, exercised control over the technician.

Employers that provide company vehicles or trucks to hourly employees must ensure that they do not exercise control over employees during the time they spend commuting to and from work in a company vehicle.

Mandatory Mode of Transportation

The California Supreme Court ruled that time workers spend traveling to and from work on an employer-provided bus must be paid because the employees fall under the control of an employer during this time, even though they are not working.[13] The case involved a group of agricultural workers required to meet for work each day at certain parking lots or other assembly areas. After the workers met at these departure points, the employer transported them in buses that the employer provided and paid for, to the fields where the work would be performed. At the end of each day, the employer transported the workers via the buses, back to the departure points. The time spent waiting for and traveling in the buses was unpaid. The employer's work rules prohibited employees from using their own transportation to get to and from the fields.

Optional Employer-Provided Transportation

You can provide optional free transportation to employees without having to pay them for their travel time, if employees are not required to use this transportation.

In *Overton v. Walt Disney Company*, an employee sought pay for commuting time on a tram provided by the Walt Disney Company. The tram picked employees up from a remote parking lot and dropped them off at the entrance to the park area. The employee complained that new construction prevented him and other employees from parking close to the entrance, and the employees were required to ride the tram to work — time for which the employees should have been compensated.

The court disagreed, ruling that employees were free to use a variety of methods to arrive at work, including public transportation, van pools, being dropped off by family or friends, walking or riding bicycles from the lot in question or arriving early enough to park at other parking areas. Therefore, using the employer-provided tram was not required, nor were the employees under the employer's control during their commute.[14]

Exception to Travel Time Pay at Minimum Wage

Wage Order 16 (Certain On-Site Occupations in the Construction, Drilling, Logging and Mining Industries) covers employees in on-site occupations in construction, drilling, logging and mining industries. Section 5 of Wage Order 16 requires that employers pay employees their regular pay rate or their overtime rate when the employer requires them to travel to a second location during the workday.

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[13] *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575 (2000)

[14] *Overton v. Walt Disney Company*, 136 Cal. App. [illegible]

Employer Liability for Employee Actions During Commute

Courts generally refuse to hold employers liable for negligent acts committed by their employees during their commutes to and from work. Courts usually find that employees are not engaged in work duties while they travel to and from work and, therefore, employers are not liable for employees' misdeeds during their commutes.

However, in a potential expansion of employer liability, a ruling from a California Court of Appeal allowed a case to proceed to trial against a company whose employee injured a motorcyclist during her commute home.[15]

The court found that when an employee's use of his/her own car creates an incidental benefit to the employer, courts may find liability even when an accident occurred during an employee's commute. An "incidental benefit" arises when an employer requires an employee to use his/her own vehicle for work, and the employer has come to rely on the use of that vehicle.

Even where there is an incidental benefit to the employer, there is no liability if the employee substantially deviates or departs from his/her job duties and that deviation is not foreseeable.

When an employee runs a personal errand that is so lengthy as to be unforeseeable, the employer will not be liable for an accident that occurs during the errand.[16] According to the court, if an accident occurs during a foreseeable stop on the way home, the employer will be liable; if the detour is so lengthy as to be unforeseeable, the employer will avoid liability.

Example: A court found that an employee's trip to the yogurt shop and the yoga studio on her way home from work was a foreseeable, minor deviation on her trip home. The court stated that an employee's deviation from his/her professional business must be "unusual and startling" in order for the employer to avoid liability.[17] Stopping at the store to pick up a couple of items, for instance, is foreseeable.

Example: In another case, an employee didn't simply make a stop on his regular commute home; he drove nearly 300 miles round trip out of his way. This detour, the court held, was "such a complete and material departure from his employment duties that it could not reasonably be considered to be an activity in pursuit of the employer's business or a minor deviation from the strict course of the employee's duties." Since the employee was not carrying out job duties at the time of the accident, the court ruled that the employer was not liable for any injuries he caused during his detour.[18]

When your employees drive as a part of their jobs, either in their own vehicles or in company-provided vehicles, work with counsel to draft a policy outlining the rules for employee driving and safety.

For information on employer liability when an employee drives under the influence, see "Alcohol at Workplace Functions" in Chapter 9, page 211.

Preparation Time

If employees must change uniforms, wash up or clean up at work, or engage in other preparatory activity that is required for the job, that time must generally be counted as hours worked. However, if the amount of time involved is too short to be counted as a practical matter, the time is not considered work time, even if changing is done on your premises.[19]

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[15] *Moradi v. Marsh USA, Inc.*, 219 Cal.App.4th 886 (2013)

[16] *Halliburton Energy Services, Inc. v. Department of Transportation*, 220 Cal.App.4th 87 (2013)

[17] *Moradi v. Marsh USA, Inc.*, 219 Cal.App.4th 886 (2013)

[18] *Halliburton Energy Services, Inc. v. Department of Transportation*, 220 Cal.App.4th 87 (2013)

[19] DLSE *Enforcement Policies and Interpretations Manual* sec. 46.6.4

California law is generally more expansive than federal law in determining "hours worked," defining it as the time when the employee is subject to your control and during which the employee is "suffered or permitted" to work.

A good rule of thumb for California employers is that if the employee engages in an activity because the job requires the employee to and you control how, when and where the employee does it, you should pay the employee.

Whether time spent changing into and out of clothes ("donning and doffing") must be paid is an issue that frequently arises. In the nonunion workplace, employees must generally be compensated under both the FLSA and California law for time spent donning and doffing certain work clothes and protective equipment. If the time spent changing into and out of clothes occurs regularly and is part of the work the employee was hired to do, the best practice is to count the time.

California law provides that "time spent changing clothes or washing up *on the employer's premises* is compensable when compelled by the necessities of the employer's business" (emphasis added). The Division of Labor Standards Enforcement (DLSE) states that, for enforcement purposes, it considers (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional activity.[20]

When the changing could be done at home, it may not be compensable. For instance, putting on a black polo shirt for the job at the local coffee shop would not be compensable time unless an employer maintained the polo shirts at work and required an employee to change when he/she got there.

Small amounts of time spent changing into and out of clothes may be disregarded in certain situations when these small periods of time are uncertain and infrequent and cannot, as a practical matter, be precisely recorded for payroll purposes. But an employer cannot arbitrarily fail to count any part of working time, no matter how small, if that working time can be practically ascertained. Unfortunately for employers, there are no bright line rules to follow, and each situation needs to be examined on a case-by case basis.

When in doubt as to whether you should count the time, consult legal counsel.

Preparation Time in Unionized Workplaces

Unlike non-union settings, the unionized setting has different rules that allow the employer and employees to bargain over whether time spent changing clothes is compensable. Section 203(o) of the FLSA allows the employer and the union to agree whether the "time spent in changing clothes or washing at the beginning or end of each workday must be compensated."

The U.S. Supreme Court ruled in a unanimous decision that steelworkers who wear certain flame-retardant gear while performing their job are not entitled to compensation for the time they spend putting the gear on before their shift and removing the gear after their shift.[21]

This Supreme Court case is important for unionized employers, especially for those in such industries as manufacturing, food processing and health care, where employees need to wear certain protective clothing or gear. The case does not directly affect non-unionized employers, but serves as a reminder of the importance of compensating employees for all time worked and the importance of specifying what the definition of "work" includes.

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[20] *DLSE Enforcement Policies and Interpretations Manual*, Section 46.6.4

[21] *Sandifer v. U.S. Steel Corp.*, 134 S.Ct. 870 (2014)

Since 1947, U.S. Steel Corp. and United Steel Workers have had a contract that did not provide compensation for changing time. Despite the contract, 800 steelworkers at various U.S. Steel plants sued, arguing that putting on and taking off their mandatory flame-retardant safety wear does not constitute "changing clothes" as used in the FLSA and should be compensable time.

The steelworkers argued that even though the collective bargaining agreement excluded time spent changing clothes from compensation, the items they were required to put on were protective gear that they were required to wear because of hazards in the steel plants, and, the gear should not be included in the definition of "clothes" because of the protective gear's specialized nature.

The workers wanted to be paid for the amount of time they spent putting on and taking off these objects — a dollar amount which could be quite large given the daily nature of the task.

The U.S. Supreme Court sided with U.S. Steel, rejecting the steelworkers claim that the "term 'clothes' somehow omits protective clothing." Relying on the dictionary definition and ordinary meaning of the word "clothes," the Court held that the term includes all items "designed and used to cover the body and are commonly regarded as articles of dress." Just because the item is worn for protection, it is not excluded from the definition of "clothes."

However, the Court did not expand the ruling as far as U.S. Steel requested — to define clothes as everything worn on the body. "Our definition leaves room for distinguishing between clothes and wearable items that are not clothes, such as certain equipment and devices," the Court said.

The Court excluded three items at issue in the case from its definition of clothes: glasses, earplugs and respirators. But the Court ruled that the employees were still not entitled to compensation because the time spent on donning and doffing the three items was such a small part of the overall time spent in changing clothes that did meet the definition.

Although the ruling in this case provides some help and guidance for unionized employers that negotiate time spent changing clothes in collective bargaining agreements, the ruling will generally not apply outside that context, and, in future cases, courts will still have to examine on a case-by-case basis the definition of "clothes" as outlined by the Court. This case was also decided under federal law.

Security Screenings

There has been a trend toward filing class action lawsuits seeking pay for the time employees spend in security screenings. Cases have been brought under both federal and California law, some against high profile companies.

Review the types of activities employees are required to engage in at the start or end of their day: Is the employee under your control? Employers with questions about compensating employees for pre- or post-shift activities should seek advice of legal counsel, especially in light of the heavy litigation in this area.

Federal Law

The U.S. Supreme Court resolved the issue of whether the time a worker spends in security screenings should be paid time under the Fair Labor Standards Act (FLSA). In *Integrity Staffing Solutions, Inc. v. Busk*, the Court held that the time spent waiting to undergo and undergoing security screenings is not compensable under the FLSA.[22]

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[22] 22. *Integrity Staffing Solutions, Inc. v. Busk*, (No. 13-433, December 9, 2014)

The case involved employees of Integrity Staffing, which provides warehouse space and staffing to clients such as Amazon. Integrity Staffing required its employees to undergo a security screening before leaving the warehouse at the end of each day.

The employees brought a class-action lawsuit against Integrity Staffing alleging that, under the FLSA, they should have been paid for the roughly 25 minutes they spent passing through a security clearance at the end of each shift.

The workers argued that the screenings were done for the sole benefit of the employer and its customers as a theft-prevention measure. The workers also alleged that the company could have reduced the time spent to a *de minimis* amount by adding screeners or staggering shifts, but chose not to.

The Ninth Circuit agreed with the worker's position and ruled that the workers should be paid for the screening time because the time was required by the company and was done for its benefit. The U.S. Supreme Court disagreed.

The FLSA contains the Portal-to-Portal act which exempts certain pre-shift and post-shift activities from hours worked. Generally, under federal law employees should be compensated for pre-shift and post-shift activities if the activities are "integral and indispensable" to the "principal activities" the employees were employed to perform.

The Supreme Court found that the workers were hired to retrieve products from shelves and package them for shipment, not to undergo security screenings, and the screenings were not tied to the productive work. The screenings were not an intrinsic element of retrieving products from shelves or packaging them to ship.

The Court contrasted the facts of this case with cases where the employees' pre- or post-shift activities met the test and were compensable, such as time battery-plant employees spent showering and changing clothes because the chemicals in the plant were "toxic to human beings" and the employer conceded that the activities were integral to productive work.

California Law

California employers are subject to California's Labor Code and Wage Orders, both of which generally provide more protections to employees than the FLSA. California law is generally more expansive than federal law in determining "hours worked," defining it as the time when the employee is subject to your control. California does not apply the "principal activities" test.

New 2016

In 2015, a federal district judge in California dismissed a class action lawsuit brought by more than 12,000 current and former Apple workers who claimed they should have been paid for time spent undergoing mandatory security bag checks.[23]

The retail store workers were required to undergo searches when they left the premises with a bag, purse, backpack, briefcase or Apple product, such as an iPhone. Apple conducted the search to ensure that no Apple products were being taken.

The searches were done after the employees had already clocked out for the day. Employees claimed that time waiting for and undergoing the search could amount to 5-15 minutes, and sometimes they had to wait in line or track down a manager or security guard to conduct the search.

The district court dismissed the class action lawsuit. Key to the court's ruling was its analysis that a worker could avoid the security screening by simply leaving the bag or other item subject to the search rule at home. Workers had the "freedom to choose to avoid searches" and some workers did, leaving bags and other searchable items at home.

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[23] *Frlekin v. Apple Inc.*, 2015 WL 6851424 (N.D.Cal. 2015)

The court also found that the time spent waiting to be searched was time spent not "work." It was time spent passively waiting, was unrelated to the employee's job responsibilities and, therefore, was not compensable work time.

This case may be appealed to the Ninth Circuit.

Education and Training Time

Employees who spend time at lectures, work courses, employer-sponsored training programs or employee meetings must count that time as hours worked for pay purposes unless:

- Time is outside of normal working hours.
- Coursework is unrelated to the employee's regular job, such as learning the requirement of a new or higher-rated job.
- Attendance is strictly voluntary (except for continuing education training).
- No production work is performed.[24]

Attendance at employee meetings, employer-sponsored training programs, lectures, work courses or meetings is not deemed voluntary if required by the employer or if the employee is led to believe that his/her nonattendance would adversely affect his/her current working conditions or continued employment. Training is directly related to the employee's job if it aids him/her in performing the present job more effectively, as distinguished from training for another labor skill.[25] However, training is not considered directly related to an employee's job if the intention of the training is to prepare him/her for advancement to a higher skill.

Employers often hold meetings or training for employees during lunch or other meal breaks. Even if a meal is provided by the employer, this is still considered working time for which an employee must be paid. For more information, see "Meeting or Training During Lunch Breaks" on page 326.

Mandatory meetings that require an employee to report to work on days off or to return to work following the end of a workday will incur reporting time pay. There may be an exception if the meeting is a recurring meeting and is scheduled in advance. For more information, see "Reporting Time Pay" in Chapter 11, page 265.

You need not pay employees for attending a state-mandated training program that you do not require or is not tailored to meet your individual needs.[26] For example, mechanics and skilled laborers voluntarily enrolled in courses on advanced electrical circuitry and attended the courses on their own time. This time was not compensable because the training was not designed to enable the employees to perform their present jobs more efficiently.[27]

You are not required to pay overtime compensation for time spent completing courses at home if enrollment in the course was voluntary and you did not require the course as a prerequisite to continued employment in the employee's current position.[28]

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24. 29 CFR sec. 785.27.; DLSE *Enforcement Policies and Interpretations Manual* sec. 46.6.5
25. 29 CFR sec. 785.27-31
26. 29 CFR sec. 553.226 (b)(1)
27. Wage and Hour Opinion Letter No. 1174 (4/28/71)
28. *Price v. Tampa Electric Co.*, 806 F.2d 1551 (11th Cir. 1987)

Public and private sector employees within a particular governmental jurisdiction may be required by law to attend specialized or follow-up training outside regular working hours to achieve certification. You need not pay public employees who attend this training.[29]

Time voluntarily spent by employees to maintain their physical fitness is not considered working time even though fitness is a job requirement. On the other hand, the time will be considered working time if the employee is required to participate in a remedial physical fitness program as a condition of continued employment.[30]

In addition to paying for the time spent in the meeting or training, the employer will be liable for a penalty of one hour's pay for each nonexempt employee who was denied a meal break.

Remember that employers must also reimburse employees for expenses incurred as part of the job and you may be required to pay for the cost of certain training courses, in addition to the time spent. For more information, see "Expense Reimbursements" in Chapter 11, page 282.

Meal and Rest Breaks

You must give nonexempt employees an opportunity to take a 10-minute paid rest break for every four hours worked, or major fraction thereof. You may not employ an employee for a work period of more than five hours per day without providing him/her with a 30-minute unpaid meal break.

If one or more rest breaks are not given, you owe the employee one hour of pay. You also owe the employee one hour of pay if the employee is unable to take a meal break. The additional pay for a missed meal or rest break must be included in the employee's next paycheck.

In 2012, the California Supreme Court decided an important meal and rest break case, *Brinker Restaurant Corp. v. Superior Court*. This chapter reflects guidance provided by this decision.[31]

Some less commonly used Wage Orders contain different timing requirements for meal and rest periods. For additional information on meal periods, review the Wage Order that covers your employees. For more information, see "Exceptions for Specific Industries" on page 335.

In addition, an employer with employees who work outside cannot require an employee to work during any "recovery period" taken to avoid heat-related illness. For more information, see "Avoiding Heat Illness" in Chapter 23, page 623.

Rest and recovery periods are paid breaks and count as hours worked.

Importance of Compliance

California employers face costly consequences for violating meal and rest break rules. Court decisions have increased the potential for large financial fines. Statutory damages for meal and rest break violations are calculated at one hour of additional straight-time pay for each employee for each work day the employee is denied the meal or rest break ("premium pay"). If the employer fails to provide both a meal and a rest break, the employee is entitled to two hours of additional premium-time pay. These damages are additional wages, which are subject to a three-year statute of limitations. For more information, see "Premium Pay for Break Violations" on page 327.

Meal and rest break compliance has been the source of a great deal of litigation. For more information, see "Brinker Decision on Meal and Rest Breaks" on page 317.

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[29] 29 CFR sec. 553.226 (b)(1)

[30] Wage and Hour Opinion Letter No. 1589 (9/12/85)

[31] *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012)

It is imperative that you understand the complex meal and rest break requirements. You must do everything you can to communicate the legal requirements to employees and give them opportunities to take the requisite breaks.

Brinker Decision on Meal and Rest Breaks

In 2012, the California Supreme Court released its long-awaited decision in *Brinker Restaurant Corp. v. Superior Court.*[32]

The question of whether employers must ensure that breaks are taken or must simply provide breaks has been a source of significant litigation in both federal and state courts. The court ultimately ruled in Brinker's favor on the most critical part of the decision — holding that employers do not have to ensure employees take their meal breaks.

Employees of Brinker International, Inc. (Brinker), the parent company of Chili's restaurants and other restaurant chains, filed their lawsuit eight years ago. The heart of the lawsuit was that Brinker failed to provide its employees with their legally mandated breaks. The case was certified as a class action and involved nearly 60,000 employees.

Key highlights of the decision include:

- Employers must "provide" employees with unpaid 30-minute meal periods, but need not "ensure" such periods are taken. Once the meal period is provided, there is no duty to police meal breaks to ensure no work is being done. The court set forth guidance as to what it means to "provide" an off-duty meal period. For more information, see "'Providing' an Off-Duty Meal Break" on page 320.
- An employee who voluntarily chooses to work during a provided meal period may be eligible for straight pay if the employer knew or reasonably should have known of the work. The employer will not be required to pay premium pay if it "provided" the meal period and the employee voluntarily did some work; only straight pay will be required if the employer knew or should have known of the work. However, if the employer discouraged the employee from taking the break or otherwise effectively precluded the employee from taking the break, the employer may be liable for an additional one hour of wages ("premium pay"). For more information, see "'Providing' an Off-Duty Meal Break" on page 320.
- Employers must provide the meal period no later than the end of the employee's fifth hour of work. For more information, see "Timing of Meal Breaks" on page 322.
- Employers do not have to provide a meal period every five hours. Instead, a second meal period is required only if an employee's work shift will exceed 10 hours. If the shift will exceed 10 hours, the employer must provide a meal period no later than the end of the employee's 10th hour of work. For more information, see "Timing of Meal Breaks" on page 322.
- Employers should generally provide rest breaks in the middle of each work period. Deviations from this general scheduling may be permissible in certain circumstances. The number of rest breaks in a workday was also specifically set forth by the court. For more information, see "Timing of Rest Breaks" on page 318.

The unanimous ruling is largely a win for California employers, but is not without potential pitfalls. Employers with vague policies may expose themselves to increased liability, and the decision makes clear that meal and rest break issues are still subject to class action lawsuits. The case also did not resolve all questions related to meal and rest breaks.

Meal and rest period lawsuits did not disappear after the California Supreme Court decided the landmark *Brinker v. Superior Court* case. But, to date, *Brinker* has made it harder for plaintiffs to get their class action lawsuits certified when the employer has clear, compliant practices and a good timekeeping system. This is good news since it is much easier, and far less expensive, for a business to defend against a single meal and rest claim than a class action lawsuit.

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[32] *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012)

Employers will continue to see cases relating to meal and rest breaks that attempt to clarify the *Brinker* decision. Employers will need to examine their meal (see "Meal Breaks" on page 320) and rest (see "Rest Breaks" on page 318) break policies and strengthen their timekeeping practices. For more information, see "Brinker Best Practices" on page 328.

Rest Breaks

Employers must authorize and permit rest periods for all nonexempt employees whose total daily work time is at least 3.5 hours. These mandatory rest breaks must be offered at the rate of 10 "net" minutes for every four hours worked, or "major fraction thereof."

The California Supreme Court in *Brinker* agreed with the DLSE that anything more than two hours is considered to be a "major fraction" of four hours.[33] In the typical eight-hour workday, an employee is entitled to receive at least two 10-minute breaks.

You must authorize and permit a certain number of 10-minute rest breaks according to the following table:

Hours Worked	Number of Rest Breaks
0 - 3.5	0
3.5 - 6.0	1
6.0 - 10	2
10.0 - 14.0	3
14.0 - 18.0	4

The Wage Orders require a rest break duration of "net" 10 minutes. This has been interpreted by the DLSE to mean that the rest period begins when the employee reaches an area away from the workstation that is appropriate for rest. In other words, if the rest area is at a distance from the workstation, the time required for the rest break can be more than 10 minutes.

You must treat rest periods as hours worked, and must pay break time as time worked. Because employees receive compensation for rest breaks, you can require them to remain on the premises during their rest breaks.

Timing of Rest Breaks

As a general rule, and insofar as practicable, the rest period should be in the middle of the four-hour work period.

In *Brinker*, the California Supreme Court ruled that employers are "subject to a duty to make a good faith effort to authorize and permit rest breaks in the middle of each work period."[34] The court stated that "in the context of an eight hour shift, [a]s a general matter, one rest break should fall on either side of the meal break ... ."

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[33] *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012)

[34] *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012)

Though this is the general rule, there is no absolute obligation to permit a rest period before a meal period. According to the court, "[s]horter or longer shifts and other factors that render such scheduling impracticable may alter this general rule." Employers are given some latitude as they may "deviate from that preferred course where practical considerations render it infeasible."

For example, it is not automatically unlawful to have a meal break at the two-hour mark and a rest break at the four-hour mark. A waiter who works from 4 p.m. to 12 a.m. may be authorized to take an early lunch at 5 p.m., and then two rest breaks thereafter.

Brinker did not explicitly define what "practical considerations" may be legally sufficient to justify an employer's departure from the general rule. The court declined to give any definitive guidance.

Employers should be cautious about departing from the general rule to provide rest breaks in the middle of each work period and should consult with counsel if practical considerations unique to their industry appear to warrant a departure from the general rule.

Rest breaks should not be combined or added to the meal breaks. *Brinker* did not address whether an employee can combine rest breaks or add them to meal breaks. The best practice, as indicated by the court, is to still have rest breaks in the middle of each work period and, thus, not combine breaks even at the employee's request.

Rest breaks should not be used to allow an employee to come in 10 minutes late or leave 10 minutes early.

For each workday you fail to authorize and permit an employee to take a required rest break, you owe the employee one additional hour of pay at his/her regular rate. This must be paid no later than the next paycheck.[35]

The Labor Code states that an employer may not require an employee "to work" during a rest period. But neither the Labor Code nor California's Wage Orders address whether an employee could be "on call" but not actively "working" during a rest period.

A California appellate court held that on-call rest periods are lawful, and rest periods may be treated differently than meal periods, but this case is now being reviewed by the California Supreme Court. In *Augustus v. ABM Security Systems, Inc.*, the court held that an employer may require employees to remain "on-call" during rest periods without violating laws mandating paid breaks.[36] The court found that although Wage Order 4 requires an employee to be "relieved of all duty" during a meal period, the portion of the Wage Order that pertains to rest periods does not include a similar requirement.

The California Supreme Court has granted review of the *Augustus* decision. Employers with questions regarding on-call rest periods should consult an attorney.

Piece Rates and Rest Breaks

A piece rate is a rate of pay based on completing a particular task or making a particular good instead of actual time worked. Recent legislation and court decisions require employers with a piece rate plan to separately compensate piece-rate workers for rest breaks.[37]

A new law effective January 1, 2016, makes significant changes for California employers who have piece-rate employees and changes the rules governing payment of these workers. In general, the new law requires the employer to compensate piece rate employees for rest and recovery periods and all other periods of "nonproductive time" **separately** from any piece rate pay and at **specified minimum rates**.

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[35] Lab. Code sec. 226.7

[36] *Augustus v. ABM Security Systems, Inc.*, 182 Cal.Rptr.3d 676 (2014)

[37] *Bluford v. Safeway Stores Inc*, 216 Cal.App.4th 864 (2013)

If your company uses a piece rate compensation system, you should review the program to ensure compliance with meal, rest and recovery period requirements, as well as other wage and hour requirements. For a specific discussion of how to pay piece rate employees for rest and recovery periods, see "Piece Rate Pay" in Chapter 11, page 250.

Exceptions

The Industrial Welfare Commission (IWC) may create an exception to these rest period rules for governmental employees who operate commercial motor vehicles, as defined in Vehicle Code section 15210, if they are covered by a collective bargaining agreement.[38]

There are several industry-specific exceptions and modifications to the rest break requirements. Employees in group homes, certain unionized employees and employees of construction, drilling, logging or mining operations may have slightly different rest period requirements. Seek professional assistance to determine which rules apply to specific industries.

Extended Rest Breaks for Breastfeeding Mothers

California and federal law require you to provide a reasonable amount of break time and a private place for employees to express breast milk.[39] For more information on these laws, see "Employees Expressing Breast Milk at Work" in Chapter 19, page 532.

Meal Breaks

An employer cannot employ someone for a work period of more than five hours without providing an unpaid, off-duty meal period of at least 30 minutes. When a work period of not more than six hours will complete the day's work, the meal period may be waived by mutual consent of the employer and the employee.

Some less commonly used Wage Orders contain different timing requirements for meal and rest periods and different rules regarding waivers. For additional information on meal periods, review the Wage Order that covers your employees and see "Meal and Rest Break Exceptions for Health Care" on page 337.

'Providing' an Off-Duty Meal Break

In *Brinker Restaurant Corp. v. Superior Court*, the court set forth specific guidelines relating to meal breaks. The court clarified that an employer's obligation is to "provide" the meal break, but not "ensure" that the employee does no work.[40]

According to the court in *Brinker*, the employer satisfies its legal obligation to provide an off-duty meal period to its employees if it:

- Relieves its employees of all duty
- Relinquishes control over their activities
- Permits them a reasonable opportunity to take an uninterrupted, 30-minute break
- Does not impede or discourage them from doing so

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[38] Lab. Code sec. 512.5

[39] Lab. Code secs. 1030-1033

[40] *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012)

A meal break can be unpaid only if all of the above conditions are met.

The duty to provide a meal break is an affirmative duty on the part of the employer that must meet the above requirements; it is more than simply making the meal break available. How these requirements are satisfied may "vary from industry to industry."

Provide a second meal break of no fewer than 30 minutes for all workdays on which an employee works more than 10 hours. Refer to the Wage Order for your industry for any exceptions, especially if your employees' shifts are 10-12 hours long.

Employers are not required to ensure that no work is done during a properly provided meal period. The employer is to relinquish control over the employee's time. For more information, see "Failure to Provide Meal Breaks and Wages Owed" on page 323.

During the meal period, employees must be free to come and go as they please and be free to leave the premises. For more information, see "Wages Required if Employees May Not Leave" on page 326.

At your discretion, meal breaks can be longer than 30 minutes. Anything longer than a one-hour meal break can raise issues related to a split shift. For more information, see "Split Shift Pay" in Chapter 11, page 263.

This chart demonstrates the number of meal breaks an employer must provide (a separate chart is provided for timing of meal breaks on page 323).

Duration of Shift in Hours	**0 Meal Breaks**	**1 Meal Break**	**2 Meal Breaks**
0 - 5.0	X		
5.0 - 6.0		X (unless valid waiver)	
6.0 - 10.0		X	
10.0 - 12.0			X (unless valid waiver of second break) (first meal period must have been taken)
12.0 - 18.0			X (no waiver of either break available)

For additional information on meal periods, review the Wage Order that covers your employees.

Do Not Discourage Employees from Taking the Meal Break

Employers cannot discourage meal periods through pressure, incentives, ridicule or reprimand. Informal pressure may result in a violation. If your scheduling patterns result in a general practice that makes taking breaks difficult, a court could find an informal policy discouraging meal periods and find a violation. The California Supreme Court in *Brinker* warned against such scheduling practices.[41]

New 2016

A recent case highlights the danger of discouraging employees from taking meal and rest breaks.

A court found substantial evidence that the employees were routinely and consistently prohibited from taking meal periods and rest breaks in violation of California law and the standard set forth by the California Supreme Court in *Brinker Restaurant Corp. v. Superior Court.*

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[41] *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012)

Seventy-three present and former employees of a trucking company which serves the Port of Oakland will share in a damages award of $964,557. The company is also required to pay another roughly half a million dollars in attorneys' fees, costs and class action enhancements.[42]

According to witnesses at trial, the company did not have a formal policy that would, at a minimum, inform employees in any way that they could take a meal period. The company also regularly discouraged drivers from taking breaks, either through scheduling that made it extremely difficult to take breaks or through reprimands.

The company did not relieve employees from duty for meal breaks, as is required. Instead, drivers testified that the company knew they were stuck waiting in line with their trucks to enter the Port and told to eat while in line and on duty.

Even though the drivers were not able to take off-duty meal breaks, evidence at trial showed that the company automatically deducted one hour of pay from each driver every day on the presumption that the drivers were actually taking an hour meal break.

Timing of Meal Breaks

The timing for meal periods was set forth by the court in *Brinker*:

- The first meal break must be provided "no later than the end of the employee's fifth hour of work."
- The second meal break must be provided "no later than the end of an employee's 10th hour of work."

Employers are often confused as to exactly what "the end of the employee's fifth hour of work" means and exactly when the meal period must be provided: Should the meal period be provided no later than 4 hours and 59 minutes into the employee's shift? Or at the exact five-hour mark?

The most prudent approach is to err on the side of caution and provide the meal break no later than 4 hours and 59 minutes into the employee's shift, instead of at the very last minute or second. This gives the employee the ability to clock out in time and is the best practice to avoid any administrative or legal claims. For example, if an employee begins an eight-hour shift at 8 a.m., he/she must start the meal period by 12:59 p.m.

For the second meal period, it must be provided no later than the end of the employee's 10th hour of work.

In *Brinker*, the court rejected the employees' argument that meal periods had to be provided on a "rolling" five-hour basis, meaning that an employee would receive a second meal break if more than five hours occurred after the time he/she took the first meal break. Instead, the court held that the second meal break must only be provided if an employee works more than 10 hours in a day.[43]

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[42] *Godfrey vs. Oakland Port Services Corp.*, 230 Cal.App.4th 1267 (2014), rev. denied

[43] *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012)

The following chart helps demonstrate how to calculate meal break timing:

Time	Hour of Work
8:00 a.m. to 9:00 a.m.	1st hour
9:00 a.m. to 10:00 a.m.	2nd hour
10:00 a.m. to 11:00 a.m.	3rd hour
11:00 a.m. to 12:00 p.m.	4th hour
12:00 p.m. to 1:00 p.m.	5th hour (provide meal period no later than end of this 5th hour or 12:59 p.m.)

"Late lunches," after the end of the employee's fifth hour, are still not permitted. The meal period must be given by the end of the employee's fifth hour of work.

"Early lunches" may be allowed, as long as the lunch is provided no later than the end of the fifth hour of work. The court noted the general rule that, in a normal eight-hour shift, one rest break should fall on either side of the meal break. Practical considerations may render this timing infeasible. For more information, see "Timing of Rest Breaks" on page 318.

For example, in certain service industries, operations may justify departure from the general rule, and it may be necessary to schedule the meal period early in the work shift. A server who starts his/her shift at 4 p.m. may need to take an early meal break at 5 p.m., before the evening rush. Even in this situation, it is recommended that employers avoid scheduling the meal period immediately after the employee begins the shift (using the above example, not right at 4 p.m. or shortly thereafter). Instead, allow a reasonable work period to occur before the meal period.

Employers should consult with counsel if practical considerations unique to their industry seem to warrant a departure from the general rule regarding meal break scheduling.

Failure to Provide Meal Breaks and Wages Owed

For each workday that you fail to provide an employee a meal break as required, you owe the employee one additional hour of pay at the employee's regular rate (premium pay).[44] The additional hour of pay is a wage owed to the employee. This allows employees up to three years to claim unpaid wages.[45]

Employers cannot discourage meal periods through pressure, incentives, ridicule or reprimand. Informal pressure may result in a violation. If your scheduling patterns result in a general practice that makes taking breaks difficult, a court could find an informal policy discouraging meal periods and find a violation. The California Supreme Court in *Brinker* warned against such scheduling practices.[46]

An employee who voluntarily chooses to work during a provided meal period may be eligible for straight pay if the employer knew or reasonably should have known of the work. The employer will not be required to pay an additional one hour of premium pay if it provided the meal period (meeting the *Brinker* standard) and the employee voluntarily did some work. For more information, see "'Providing' an Off-Duty Meal Break" on page 320.

If the employer does not provide an off-duty meal period that meets the above requirements, or if the employer prevents the employee from taking the full uninterrupted meal period, the employer will be liable for premium pay.

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[44] IWC Wage Orders 1 - 15, sec. 11; Wage Order 16, sec. 10; Wage Order 17, sec. 9; Lab. Code sec. 226.7

[45] *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007)

[46] *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012)

Recording Meal Breaks

The *Brinker* decision highlights the need for accurate recordkeeping. Employers need policies and timekeeping records that demonstrate that an uninterrupted, 30-minute meal period was provided no later than the end of the fifth hour of work. For more information, see "Timekeeping and Recording Guidelines" on page 329.

Employees should be required to track the start and end of meal periods. Timekeeping records should reflect that the meal period was provided to the employee by the correct time, regardless of whether the employee voluntarily chose to perform work during the meal period.

Employees should be required to accurately report all time worked. It is a good practice to have employees sign their time records and verify that they have reported all time worked and that they understand that off-the-clock work is not permitted.

In order to avoid liability for overtime or other legal obligations, it is a good practice to set a policy of no "off-the-clock" work. This can be referred to in your meal and rest period policy and also in a separate timekeeping policy.

If an employee misses a meal period for any reason, he/she should report to human resources (or other office administrator) the reason for the missed meal period. This will allow you to account for the time for payroll purposes and also to monitor why the employee is missing meal periods:

- Is a supervisor discouraging them?
- Is the employee voluntarily choosing to work during a provided period and how are you going to address that to avoid incurring additional pay obligations?

Employees should be instructed to inform management if they are discouraged or impeded from taking a meal break by their supervisor or anyone else. Employees should not be required to report this only to their direct supervisor, as it may be the supervisor who is discouraging them from taking the break.

You should consider regularly auditing your timekeeping records to see if there is a pattern of missed meal periods.

Waiver if Six Hours Ends the Shift

The employee may waive his or her meal period if the day's work will be completed in no more than six hours, provided you and the employee mutually consent to the waiver. It is a best practice to have this waiver in writing, but it is not required.

Meal Break Waiver - Employee Shift 6 Hours or Less

Meal Break Waiver – Employee Shift 6 Hours or Less - Spanish

Second Meal Break Waiver

An employee can waive the second meal break only if all of the following conditions are met:

- The total hours worked on that workday are not more than 12
- You and the employee mutually consent
- The first meal break of the workday was not waived[47]

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[47] Lab. Code sec. 512

Meal Break Waiver - Second Meal

Meal Break Waiver - Second Meal - Spanish

Different Wage Orders may contain different waiver requirements. For more information, see "Meal and Rest Break Exceptions for Motion Pictures" on page 338.

On-Duty Meal Breaks

Employees can take on-duty meal breaks in certain limited circumstances. An on-duty meal break must meet all of the following conditions:

- Is permitted only when the nature of the work prevents an employee from being relieved of all duty
- Must be agreed to in writing by you and the employee
- Must be paid
- Can be revoked at any time in writing by the employee, except under Wage Order 14 (Agricultural Occupations)

In *McFarland v. Guardsmark*, a court clarified that an "on-duty meal break" is a type of meal break that employees take and that it must be paid. An on-duty meal break is not a waiver of an employee's meal break. This is particularly important if employees work between 10- and 12-hour shifts. Employees cannot waive the second meal break, which is required by law, if they waived the first meal break. If employees take an on-duty meal break, they can still waive their second meal break and you will not be liable for the additional hour of pay for a missed meal break.[48]

Situations where the Division of Labor Standards Enforcement has indicated that an on-duty meal period might apply include a gas station open at night where there is only one-worker on duty.

However, the Ninth Circuit, in *Abdullah v. U.S. Security Associates, Inc.*, called into question whether the on-duty meal period exception can be used by an employer who chooses to have only a single person working when they could hire a relief person. The Ninth Circuit noted that an employer might legitimately require on-duty meal breaks "where the employee is the only person employed in the establishment and closing the business would work an undue hardship on the employer." But, the court explained, this defense is risky where the employer is the one who made the decision to only staff one person in the first place.

The Ninth Circuit allowed security guards to proceed with a class action lawsuit, and it will be up to the trial court to decide whether the nature of the work prevented the employees from being relieved. The inquiry, according to the court, will turn on whether the security guard company is allowed to adopt a single-guard staffing model that does not allow for off-duty meal periods — when that model results from its own staffing decisions. The court noted that the "nature of the work" exception is a high standard to meet.[49]

Use caution and consult with legal counsel before authorizing on-duty meal breaks. On-duty meal breaks have been upheld only in very limited circumstances.

A pattern or practice of allowing employees to work through their meal breaks exposes you to expensive litigation. The better solution is to explain to employees and supervisors what the law requires and remind them that it is your responsibility to ensure the law is followed.

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[48] *McFarland v. Guardsmark, LLC*, 538 F. Supp. 2d 1209 (N.D. Cal. 2008)

[49] *Abdullah v. U.S. Security Associates, Inc.*, 731 F.3d 952 (9th Cir. 2013)

Make sure to:

- Properly document missed meal breaks, particularly if an on-duty break or a waiver is invoked
- Pay nonexempt employees one hour at their regular rate of pay if they miss any meal break without a valid waiver or on-duty meal break

Meal Break - On Duty

Designated Eating Place

If employees must eat on the premises, you must designate a suitable place for that purpose.[50]

Wages Required if Employees May Not Leave

In *Bono v. Bradshaw*,[51] a California Court of Appeal ruled that if an employer requires employees to remain on the premises for a meal break, the employer denies that employee the use of the time for his/her own purposes. Because the employee remains under the employer's control, the meal break must be paid.

If you require employees to remain on the premises, you may be obligated to pay premium pay (an exception may exist for the health care industry).

In most situations, the courts and Labor Commissioner are likely to rule that wages are owed any time the employee is under your control. This applies not only to meal breaks, but also to education and training sessions, travel time required (other than an employee's normal commute), preparation (changing and clean-up time), and other similar time that you might not consider time worked.

Meeting or Training During Lunch Breaks

Employers often hold meetings or training for employees during lunch or other meal breaks. Even if you provide a meal, this is still considered working time for which an employee must be paid. In addition to paying for the time spent in the meeting or training, you will owe an additional one hour's pay for each nonexempt employee who is denied a meal break. For more information on this penalty, see "Failure to Provide Meal Breaks and Wages Owed" on page 323.

If you hold a meeting during the normal lunch break time, you can avoid the penalty if you allow employees an off-duty meal break of at least 30 minutes before the meeting. This 30-minute meal period must start no later than 4 hours and 59 minutes into the employees' shift. Providing food during the meeting is optional.

Meal Break Provision in Wage Order 16

A provision in Wage Order 16 (Certain On-site Occupations in the Construction, Drilling, Logging and Mining Industries) exempts employees working under the terms of a collective bargaining agreement from meal break requirements. In *Bearden v. U.S. Borax Inc.*, a California Court of Appeal ruled that this provision is invalid. The court found the Wage Order to be contrary to the Labor Code's meal break provision.

The court found that the Wage Order unlawfully expanded the statute's requirements. It was left to the trial court to decide if the Court of Appeal's determination will apply retroactively, thereby imposing significant penalties on the employer. This case serves as a reminder that, although regulations and Wage Orders provide useful guidance to employers, statutory requirements will prevail.[52]

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[50] IWC Wage Orders 1 - 13, sec. 11; Wage [illegible]

[51] *Bono v. Bradshaw*, 32 Cal. App. 4th 968 (1995)

Exceptions — Know Your Wage Order

These are general requirements based on language applicable to many common Wage Orders. However, some less commonly used Wage Orders contain different timing requirements for meal and rest periods. For example, Wage Order 12, which applies to the motion picture industry, requires meals at different intervals than this general policy.

Review your Wage Order to determine if any different meal period requirements apply to your employees. For more information, see "Exceptions for Specific Industries" on page 335.

The IWC can create an exception to these meal period rules for governmental employees who operate commercial motor vehicles, as defined in Vehicle Code section 15210, if the employees fall under a collective bargaining agreement.[53]

The Labor Commissioner no longer has the discretion to grant an employer an exemption from the meal break requirements.[54]

Wage Order 1 (Manufacturing Industry) provides that the parties to a valid collective bargaining agreement can agree to a meal period that commences after no more than six hours of work for employees covered by that collective bargaining agreement.

Premium Pay for Break Violations

There has been a great deal of discussion about the premium wage employers owe an employee who misses a meal break and a rest break in one day — is it one hour of pay? Or is it two hours of pay because two violations occurred?

In *United Parcel Service v. Superior Court of Los Angeles County*, a California Court of Appeal ruled that there are two separate remedies because the premium wage requirement is contained in two separate sections of the Wage Orders.

The additional hour of pay requirement is found in Labor Code section 226.7, which discusses the remedies together, rather than in separate sections. However, the actual language of the statute states that if a meal or rest break is not provided, the employer owes the employee one hour of pay for each work day that the meal or rest break is not provided.

The court reviewed the legislative history of Labor Code section 226.7 and concluded that the Legislature intended to match the Wage Order provisions, which clearly provide for two separate remedies — one for a violation of the required meal break and one for a violation of the rest break.[55]

Therefore, employers must pay two hours of premium pay for each day that two separate violations occur.

Labor Code section 226.7 also requires one hour of premium pay for missed recovery periods (to prevent heat illness). An employee is due a single hour of premium pay if any one or more recovery periods is missed in a day. If a meal break, rest break and recovery period were all missed in one day, the employer must pay three hours of premium pay for that day.

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[52] *Bearden v. U.S. Borax Inc.*, 138 Cal. App. 4th 429 (2006); *Lazarin v. Superior Court of Los Angeles County*, 188 Cal. App. 4th 1560 (2010)

[53] Lab. Code sec. 512.5

[54] IWC Wage Orders, sec. 17

[55] *United Parcel Service, Inc. v. Superior Court of Los Angeles County*, 192 Cal.App.4th 1425 (2011

In *Murphy v. Kenneth Cole Productions, Inc.*, the California Supreme Court ruled that a three-year statute of limitations, not one year, applies to the one additional hour of pay employers must pay employees when a meal or rest break is not provided. The court also found that employees and employers can add wage claims when a trial court hears the case, even though the claims were not presented in an administrative hearing.

John Paul Murphy worked as a store manager for Kenneth Cole Productions for two years. He was classified as an exempt employee. He was paid a weekly salary and generally worked 10-hour days. When the store was busy, he did not have an opportunity to take a meal break or even to use the restroom. His primary job functions were making sales, processing markdowns, cleaning and working in the stock room. After Murphy resigned, a friend told Murphy that he was not paid correctly because he was wrongly classified as an exempt employee. Murphy then filed a claim with the Labor Commissioner. Because the company wrongly classified him as exempt, the company did not pay him overtime and did not provide meal and rest breaks. Murphy won his case with the Labor Commissioner. The employer appealed the case to the courts. The case eventually made it to the California Supreme Court.

The court was asked to determine if the one hour of pay is a penalty against the employer or an additional wage payable to the employee. If a penalty, employees' claims would be limited to one year of time. If a wage, employees could claim up to three years of unpaid wages.

After extensive review of the history behind the missed meal and rest breaks pay requirement, the court clarified that wages are benefits that an employee is entitled to as part of compensation, including money, vacation pay and room and board. Employees who must forego the meal and rest breaks give you free work and lose a benefit to which they are entitled. In other words, the employees lost wages they were owed. The hour of additional pay is not only an incentive for employers to comply with the law but, foremost, a premium wage that compensates employees — not a penalty.[56]

***Brinker* Best Practices**

Following the California Supreme Court's decision in *Brinker*, the employer's responsibility to have specific meal and rest break policies and to document that the meal break was provided is even more important. You should draft specific break policies for your operation. Vague policies that are subject to interpretation by the employee increase your risk of liability.[57]

Meal and rest break policies should stress the timing of the breaks. Consider whether formally scheduling breaks works for your organization. Periodically remind employees of your policy.

The following are some additional general guidelines:

- Comply with the timing requirements for meal and rest breaks issued by the court. For more information, see "Timing of Rest Breaks" on page 318 and "Timing of Meal Breaks" on page 322.
- Meet your obligation to provide an uninterrupted 30-minute meal break where the employee is relieved of all duty. Record that you have done so. For more information, see "'Providing' an Off-Duty Meal Break" on page 320.
- Require employees to accurately record time in, meals, and time out. For more information, see "Recording Meal Breaks" on page 324.
- Regularly audit your timecard records to determine whether employees are accurately reporting time and/or if there is a pattern of employees working through meal breaks.

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[56] *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007)

[57] *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012)

- Educate managers about their obligations relating to meal and rest periods and discipline managers who do not follow policy.
- Inform employees that they should notify management if they have been denied the opportunity to take a meal or rest break. Employees should not be required to report this only to their direct supervisor, as it may be the supervisor who is discouraging them from taking the break.
- Have employees report the reason for any missed meal period to human resources (or other office administrator). This will allow you to account for the time for payroll purposes and also to monitor why employees are missing meal periods.
- Consult with legal counsel regarding the approach that is best for your industry.

Timekeeping and Recording Guidelines

You must maintain required payroll records in ink or in other indelible form. The payroll records must be properly dated, showing the month, day and year. Keep payroll records on file for at least four years at the place of employment or at a central location within California. Also, California law requires you to maintain an accurate record of employees' hours of work and compensation.

Every employer is required by law to keep accurate information about each employee, including the following:

- Full name, home address, occupation and Social Security number
- If under 18 years, birth date and designation as a minor
- Time records showing when the employee begins and ends each work period
- Meal periods, split shift intervals and total daily hours worked
  - Meal periods during which operations cease and authorized rest periods need not be recorded
- Total wages paid each payroll period, including value of board, lodging or other compensation actually furnished to the employee
- Total hours worked in the payroll period and applicable rates of pay

  This information must be made readily available to the employee upon reasonable request.
- When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula must be provided to employees. An accurate production record must be maintained by the employer.

You must furnish additional information about the hours worked in the pay period; deductions made; the name and address of the employer; and the applicable rates of pay. This information must be contained as a detachable part of the employee's paycheck or in a separate itemized statement.[58] For more information on this requirement, see "Itemized Wage Statement" in Chapter 11, page 285.

Penalties for Failure to Keep Payroll Records

There are consequences for failing to keep records required by Section 7 of each IWC Wage Order. An employee's records must be available for inspection by the employee upon reasonable request.

In addition to any other civil penalties provided by law, any employer or any person acting on behalf of the employer who violates or causes to be violated the provisions of this order, are subject to the following.

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[58] Lab. Code sec. 226

Wage Order violations:

- Initial violation — $50 for each underpaid employee for each pay period during which the employee was underpaid in addition to the amount that is sufficient to recover unpaid wages.
- Subsequent violations — $100 for each underpaid employee for each pay period during which the employee was underpaid in addition to an amount that is sufficient to recover unpaid wages.
- The affected employee shall receive payment of all wages recovered.

Failure to provide wage deduction statements or records:

- Initial violation — $250 per employee per violation
- Subsequent violations — $1,000 per employee for each violation

The Labor Commissioner can also issue citations pursuant to California Labor Code sections 1197.1 and 1199 for nonpayment of wages for overtime work.

Labor Code section 206.5 was amended in 2008, making null and void the execution of any release on account of wages due. Execution of a release includes requiring an employee, as a condition of being paid, to execute a statement of the hours he/she worked during a pay period that you know to be false. Employers who violate this law are guilty of a misdemeanor.

The intent was to prevent unscrupulous employers from withholding pay until an employee acknowledged false time records. Follow the law. Keep accurate time records. Do not force employees to work off the clock or miss meal and rest breaks. Pay employees on time.

Employers cannot prohibit employees from maintaining a personal record of hours worked or, if the employee is paid on a piece-rate basis, piece-rate units earned.[59]

For more information, see Chapter 8, "Personnel Records and Privacy."

Rounding Practices

When calculating the number of hours worked, the state Labor Commissioner uses the U.S. Department of Labor practice of rounding employees' hours to the nearest five minutes.[60] However, for enforcement purposes, the Labor Commissioner will accept the practice of computing working time by rounding to the nearest five minutes or one-tenth or one-quarter of an hour. The rounding must be used in such a manner that it will not result in failure to compensate the employees properly for all the time they actually worked over a period of time.

According to the Labor Commissioner, "When auditing payroll records, Division personnel will ascertain the facts regarding the timekeeping requirements" for example, the employees' true work patterns and if the time records accurately reflect these patterns.[61] In recording working time, you can disregard insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot be precisely recorded for payroll purposes as a practical administrative matter.[62]

The Fourth District Court of Appeal recently concluded that, under California law, employers may round employee timecard entries to the nearest-tenth of an hour. This ruling is particularly important because there is no statute or prior case law that expressly authorizes this common practice, a practice that is permissible under federal law and followed by California's labor agency. The court did not address whether rounding to one quarter of an hour is acceptable.[63]

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[59] Lab. Code sec. 1174

[60] DLSE *Enforcement Policies and Interpretations Manual* secs. 47.1, 47.2

[61] DLSE *Enforcement Policies and Interpretations Manual* sec. 47.2.2.2; 29 CFR sec. 785.48(b)

[62] DLSE *Enforcement Policies and Interpretations Manual* secs. 47.2.1, 47.2.1.1

In the case, *Silva v. See's Candy Shops, Inc.*, See's utilized a timekeeping software system to keep track of its employees' working hours. The software system required employees to "punch" into the system at the beginning and end of their shift. Adjustments to the timecards were made only in accordance with two See's policies: (1) the nearest-tenth rounding policy; and (2) the grace period policy.

A class action lawsuit was brought by a former employee challenging these two policies:

- Under the nearest-tenth rounding policy, in and out punches were rounded up or down to the nearest tenth of an hour (every six minutes beginning with the hour mark). Thus, the time punches were rounded to the nearest three minute mark. For example, if an employee clocked in at 7:58 a.m., the system rounded up the time to 8:00 a.m. If the employee clocked in at 8:02 a.m., the system rounded down to 8:00 a.m.
- Under the separate grace period policy, an employee whose schedule had been programmed into the timekeeping system could voluntarily punch in up to 10 minutes prior to their scheduled start time and 10 minutes after their scheduled end time. Employees, under See's rules, were not permitted to work during that time, but could use it for personal activities. Since employees were not supposed to be working during the grace period, if an employee punches in during the grace period, the employee was paid based on scheduled start/stop time, rather than the punch time. The scheduled start/stop time became the compensable time. If the employee actually did work during the grace period, the manager had to make an adjustment. If the grace period rule is applied, the nearest-tenth rounding policy is no longer relevant; the start/stop time for the employee will be exactly the employee's scheduled time, rather than their punched time.

In approving See's rounding policy, the court relied upon the federal Department of Labor (DOL) rounding standard in determining that rounding policies are permissible provided the policy is "fair and neutral on its face" and over time does not result in the failure to properly compensate the employee. In addition, the court was persuaded by the fact that the federal standard was also followed by the DLSE.

See's was able to demonstrate that its nearest-tenth rounding policy went up and down and, that the policy, over time, did not result in a loss to the employee. See's was also allowed to assume, based on its formal policy, that the employee was not working and not under its control during the grace period. See's could use the scheduled start/stop time for pay purposes absent evidence that the employee actually worked during the grace period. Additionally, See's was able to present evidence that employees knew about the rounding and grace period policies. Because See's policies were clear and understood by its employees and because See's could show that the policies did not result in underpayment to its employees, See's prevailed in the action.

The court only approved the practice of rounding to the nearest one-tenth and no other rounding practice. Consult legal counsel if you have any questions regarding your rounding practices.

Accurately Recording Time

Your company must keep accurate records of hours worked by nonexempt employees to comply with applicable state and federal laws.[64]

Timekeeping records should reflect start and end time for the employee's shift. Employees should also clock out for the meal period and record the start and end of the meal period. Time records should reflect that the meal period was provided to the employee by the correct time, regardless of whether the employee voluntarily chose to perform work during the meal period.

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[63] *See's Candy Shops, Inc. v. Su*

[64] Lab. Code sec. 1174

For more information, see "Recording Meal Breaks" on page 324 and "Failure to Provide Meal Breaks and Wages Owed" on page 323.

The California Supreme Court's decision in *Brinker Restaurant Corp. v. Superior Court* noted the importance of maintaining records that show an employee was provided an uninterrupted 30-minute meal period before the end of the fifth hour of work. The need for accurate timekeeping and recordkeeping was underscored by the court.[65]

Your company policy should generally define your timekeeping practices, including that employees should accurately report all time worked and immediately report any errors to a supervisor. Employees should be required to verify to the employer that their time record is accurate, and should sign and acknowledge that they accurately reported all hours worked for that time period.

CalChamber's ***Employee Handbook Creator*** can help you easily create an employee handbook that contains these policies. Purchase at the CalChamber store at store.calchamber.com.

Employers may want to consider regularly auditing timecard records to determine whether employees are accurately reporting time and/or if there is a pattern of employees working through meal breaks.

In addition, your company's handbook should communicate to employees the consequences for:

- Falsification, destruction, modification or removal of time records;
- Late or early recording of time; or
- Recording another employee's time records.

Prohibiting Off-the-Clock Work

Wage-and-hour lawsuits involving "off-the-clock work" are on the rise at both the state and federal levels. In these types of lawsuits, nonexempt employees claim they weren't paid for time spent performing work for the employer either before or after their scheduled shift. But employers can minimize the risk with strong policies and consistent enforcement of the policies.

Employers have the right to prohibit off-the-clock work.

In *Brinker*, the California Supreme Court refused to allow the employees to pursue a class action claim against Brinker for off-the-clock work. The court noted that Brinker had a specific policy prohibiting off-the-clock work and requiring an employee to notify a manager immediately if time records were not accurately recorded.

The employees claimed they were required to perform work while clocked out during their meal period. The unanimous court held that when employees are clocked out, this creates the presumption that they are doing no work. The court held that anecdotal evidence of individual instances is not sufficient to allow class certification.[66]

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[65] *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012)

[66] *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012)

In another case, a California court dismissed an off-the-clock lawsuit before trial, finding that the employer was not liable because: [67]

- The employer explicitly prohibited off-the-clock work;
- The employee worked off-the clock contrary to this policy; and
- The employer had no actual or constructive notice of the employee's unapproved off-the-clock work.

The employee, Henry Jong, worked as an Outpatient Pharmacy Manager (OPM) for Kaiser. Jong and two other managers filed a class-action lawsuit alleging unpaid overtime for off-the-clock work and other wage-and-hour violations.

Jong sued under California Labor Code section 1194, which allows a worker to sue for unpaid overtime wages. But an employer's liability for overtime is limited to those instances where the employer has actual or constructive knowledge that an employee worked overtime.

If the employer doesn't know the employee worked overtime and the employee fails to notify the employer or deliberately prevents the employer from learning of the overtime work, then an employer's failure to pay the overtime is not a legal violation. An employer has to have the opportunity to comply with its overtime obligations and can't do so if it doesn't know overtime is being worked. This is the law in California and under the federal FLSA.

Kaiser argued that Jong lacked evidence that Kaiser "failed to pay overtime wages for hours he worked that Kaiser knew or should have known he worked." The court agreed with Kaiser.

Jong acknowledged the following facts, which proved fatal to his lawsuit:

- Jong knew it was Kaiser's policy to pay for all hours worked, including overtime, even if an employee failed to obtain pre-approval for the overtime.
- Jong knew of Kaiser's written policy that OPMs should be clocked in whenever they were working.
- Jong knew of Kaiser's timekeeping rules and how to use the timekeeping system.
- Jong signed an "attestation" form stating that off-the-clock work was not allowed.
- Jong was paid for time he recorded on Kaiser's recording system, including both approved overtime and overtime that was not approved in advance.
- If Jong requested approval to work overtime, the request was never denied.
- No manager or supervisor ever told Jong that he should perform work before he clocked in, after he clocked out or to otherwise work off the clock.
- Jong did not know whether anyone in Kaiser management was aware he was performing off-the-clock work.
- Jong was unable to recall the number of off-the-clock hours worked and kept no written record of those hours.

This case highlights the benefits of a strongly written policy that prohibits off-the-clock work.

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[67] *Jong v. Kaiser Foundation Health Plan, Inc.*, 226 Cal.App.4th 391 (2014)

Tips on Off-the-Clock Policies and Practices

You may want to consider the following when creating policies and practices prohibiting off-the-clock work:

- Be specific about what you mean by "off-the-clock work," such as no checking emails at home, no performing work in the morning before logging in and no running work errands after logging out.
- Look at how your employees work and let them know exactly what you mean by off-the-clock work.
- It's not enough to merely have a policy prohibiting off-the-clock work or unauthorized overtime: Supervisors should regularly check in with employees to ensure that they are not performing off-the-clock work.
- If you learn an employee worked off the clock in violation of the policy, you should report the off-the-clock work to HR as a disciplinary matter.
- Train supervisors to not permit or encourage off-the-clock work. Supervisors who violate your policy may be subjected to discipline.
- Examine any company practices that tie supervisor rewards to not incurring overtime or keeping labor hours low. Are these practices encouraging off-the-clock work?

Don't forget that you will have to pay the employee for the time, regardless of the employee violating the policy. Even unauthorized overtime or off-the-clock time must be paid.

Remote Work and Off-the-Clock Problems

In this era of smartphones and tablets, remote work also creates off-the-clock liability issues. There are some tips that can help you set limits on remote work by nonexempt employees and potentially decrease liability:

- Consider not issuing smartphones/tablets/laptops to nonexempt employees.
- Instruct nonexempt employees that checking emails before or after a scheduled shift is not allowed without advance approval, and that if it does happen, with or without approval, the employee must report the time worked.
- Pay nonexempt employees if you know they logged in after hours to check email. For instance, if you get an email from your nonexempt secretary at 6 a.m., talk to him/her about off-the-clock work but remember to pay the employee for the time worked.
- Tell managers to minimize after-hours emails sent to nonexempt employees. If an email needs to be sent, train managers to indicate whether a response can wait until the employee's regular work day begins.
- Block after-hours access to company servers or allow access only with advance approval.

Clock Records Versus Actual Hours Worked

If you use time clocks, you need not pay employees who voluntarily come in before their regular starting time or remain after their shift ends for these periods of time if they do not engage in any work. You can disregard their early or late clock punching. You cannot always avoid minor differences between the clock records and actual hours worked. However, you should discourage major discrepancies because they cast doubt on the accuracy of the records of the hours actually worked.[68]

Exceptions for Specific Industries

Certain industries require variations in the way hours of work are recorded, how records are maintained and how certain types of hours are treated for pay purposes.

Payroll Record Exceptions for Public Works — Contractors and Subcontractors

Each contractor and subcontractor engaged in public works is required to keep accurate payroll records that show the employee's name, address, Social Security number (SSN), work classification and straight-time and overtime hours worked each day and each week.[69] These records should also show the actual per diem wages paid to each journeyman, apprentice, employee or other employee by the contractor or subcontractor in connection with any public works project.

The payroll must be certified and available for inspection at all reasonable hours at your principal office. If the contractor willfully fails to comply with disclosure requirements, he/she will be denied the right to bid on any public works contracts for one year and will forfeit $100 for each calendar day of noncompliance.[70] The public does not have access to records at the contractor's principal office, but rather through the body awarding the contract or through the DLSE. The individual employee's name, address and SSN are not available to the general public.

Hours Exceptions for Pharmacies

People employed to sell retail drugs and medicines or to compound physicians' prescriptions cannot work at the store, pharmacy, dispensary or laboratory more than an average of nine hours per day, more than 108 hours in any two consecutive weeks or more than 12 days in any two consecutive weeks.[71]

Pharmacists are not exempt from overtime, unless they individually meet the tests for either the executive or administrative exemptions.[72]

Hours Exceptions for Railroads

No train crew member can work more than 12 continuous hours, after which he/she is required to be off duty for at least 10 consecutive hours.[73] Any train crew member who has been on duty for 12 hours in the aggregate within a 24-hour period is required to take off eight consecutive hours before returning to duty.[74] Exceptions to these limits include emergencies that could not have been foreseen.[75]

Hours Exceptions for Smelters

Employment periods for smelters and underground workings cannot exceed eight hours within any 24-hour period, excluding meals.[76] However, you can allow your employees to vote to exceed eight hours in a 24-hour period. This vote requires a two-thirds majority, a secret ballot, certain advance notice to employees and informational meetings.[77]

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[68] DLSE *Enforcement Policies and Interpretations Manual* secs. 47.2.2, 47.2.3

[69] Lab. Code sec. 1776

[70] Lab. Code sec. 1777.7

[71] Lab. Code sec. 850

[72] Lab. Code sec. 1186

[73] Lab. Code secs. 601, 602

[74] Lab. Code sec. 603

[75] Lab. Code sec. 607

[76] Lab. Code sec. 750

[77] Lab. Code sec. 750.5(b)

If an employer and a labor organization that represents employees have entered into a valid collective bargaining agreement that pertains to wages and work hours, employees in these industries can work up to 12 hours in any 24-hour period.[78]

Hours Exceptions for Agriculture

Individuals employed in an agricultural occupation covered by Wage Order 14 (Agricultural Occupations) are not covered by the requirement of one day's rest in seven.[79]

Hours Exceptions for Agricultural Processing

Wage Order 3 (Canning, Freezing and Preserving); Wage Order 8 (Industries Handling Products After Harvest); and Wage Order 13 (Industries Preparing Agricultural Products for Market, On the Farm) allow you to exclude from hours worked recess periods occurring during the workday. All of the following conditions must be met:

- The recess must last at least 30 minutes.
- You must notify the employee of the time to report back to work.
- The employee must be allowed to leave the premises.
- No more than two work recesses can occur on a single shift.
- The total recess time must be less than two hours long.[80]

Meal and Rest Break Exceptions for Construction, Drilling, Logging and Mining

Wage Order 16 (On-Site Construction, Drilling, Logging and Mining) provides more rest break flexibility than is available under the other Wage Orders. In addition, in 2001, the Labor Commissioner issued a legal opinion allowing even greater flexibility than provided by Wage Order 16.

Wage Order 16 covers employees in the on-site occupations of construction, drilling, logging and mining. Note that employees in these industries who are not on-site employees, such as clerical employees, generally work under Wage Order 4 (Professional, Technical, Clerical, Mechanical and Similar Occupations) and do not fall under the exceptions discussed here.

For employees working under Wage Order 16, you can:

- Stagger rest breaks to avoid interruption in the flow of work and to maintain continuous operations.
- Schedule rest breaks to coincide with breaks in the flow of work that occur in the course of the workday.
- Require employees to take their rest breaks in the employees' immediate work area.[81]
- When two rest breaks are required in a workday, combine the second rest break with the meal break if the first rest break was provided within the first four hours of work.[82]

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[78] Lab. Code sec. 750.5(a)

[79] Lab. Code sec. 554

[80] DLSE *Enforcement Policies and Interpretations Manual* sec. 47.3; IWC Wage Orders 3, 8 and 13 sec. 3(f)

[81] IWC Wage Order 16 sec. 11

[82] Legal Opinion Letter of California Labor Commissioner, September 17, 2001

Under Wage Order 16, you need not provide rest breaks in limited circumstances when the disruption of continuous operations would jeopardize the work's product or process. However, you must make up the missed rest break within the same workday or compensate the employee for the missed 10 minutes of rest time at the regular rate of pay.

Meal and Rest Break Exceptions for Residential Care

Effective January 1, 2002, the IWC created an exemption from rest break[83] and meal break[84] requirements for certain residential care employees. These exemptions apply to:

- Employees of 24-hour residential care facilities for the elderly, blind or developmentally disabled individuals.
- Employees with direct responsibility for children receiving 24-hour residential care, when those children are less than 18 years of age or not emancipated from the foster care system.

You can require these residential care employees to remain on the premises and maintain general supervision of residents during rest periods if they are in sole charge of residents. You must allow another rest period if an employee is required to interrupt a break to respond to the residents' needs.

Similarly, you can require these residential care employees to work on duty meal periods when necessary to meet regulatory or approved program standards. In addition, one of the following two conditions must be met:

- The residential care employees eat with residents during residents' meals and you provide the same meal at no charge to the employee.
- The employee is in sole charge of the resident(s) and, on the day shift, you provide a meal at no charge to the employee.

Employees who work the day shift can have an off duty meal period if they give you 30 days' notice for each instance in which they desire an off duty meal. However, there can be no more than one off duty meal period every two weeks.

Meal and Rest Break Exceptions for Health Care

Employees in the health care industry who work shifts in excess of eight hours total in a workday can voluntarily waive their right to one of their two meal breaks. To be valid, the waiver must be documented in a written agreement voluntarily signed by both you and your employee.

The employee can revoke the waiver at any time by providing you with at least one day's written notice. The employee must be fully compensated for all working time, including an on-the-job meal break, while the waiver is in effect.[85]

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On October 5, 2015, legislation was enacted to clarify that the Wage Orders which allow for this meal period waiver in the health care industry are still in effect. The legislation was passed to deal with uncertainty caused by a California Court of Appeal decision in *Gerard v. Orange Coast Memorial* that questioned whether employees could agree to waive the second meal period if the shift exceeded 12 hours — a common practice.

The legislation clarifies that employees in the health care industry can continue to validly waive one of their two meal periods, even when the shift is more than 12 hours.

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[83] IWC Wage Order 5-2002 sec. 12

[84] IWC Wage Order 5-2002 sec. 11

[85] IWC Wage Orders 4 and 5

Meal and Rest Break Exceptions for Motion Pictures

In the motion picture industry, no employee can work more than six hours without a meal break of no fewer than 30 minutes nor more than one hour. You must call subsequent meal breaks for all employees sooner than six hours after the end of the earlier meal break.

Unless the employee is relieved of all duty during a 30-minute meal break, the meal break is considered an on duty meal break and counted as time worked. An on duty meal break is permitted only when the nature of the work prevents an employee from being relieved of all duty. You and your employee must have a written agreement.

If an employee in the motion picture industry is covered by a collective bargaining agreement that provides for meal breaks and a monetary remedy if a required meal break is missed, the agreement's provisions supersede the meal break penalty provisions in the Labor Code[86] and Wage Order 12 (Motion Picture Industry).

When employees must eat on the premises, you must designate a suitable place for that purpose.

Meal and Rest Break Exceptions for the Broadcast Industry

If an employee in the broadcasting industry is covered by a collective bargaining agreement that provides for meal breaks and a monetary remedy if a required meal break is missed, the agreement's provisions supersede the meal period penalty provisions in the Labor Code[87] and Wage Order 11 (Broadcasting Industry).

When employees must eat on the premises, you must designate a suitable place for that purpose.

Meal and Rest Break Exceptions for the Wholesale Baking Industry

A wholesale baking organization can have a collective bargaining agreement that provides for a 35-hour workweek. This workweek consists of five seven-hour days and pays 1.5 times the regular hourly rate for hours in excess of seven per day. In these cases, the organization is exempt from the meal break rules if it gives covered employees a rest break of not less than 10 minutes every two hours.[88]

Meal Break Exemptions

Labor Code sections 512(e) – (g) were added to provide additional exceptions to the meal break requirement for employees in the following industries:

- Construction employees
- Commercial drivers
- Security services (a person providing security services must be a registered security officer in accordance with the Business and Professions Code and be employed by a private patrol operator)
- An electrical corporation, a gas corporation or a local, publicly owned electric utility

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[86] Lab. Code sec. 512(d)
[87] Lab. Code sec. 512(d)
[88] Lab. Code sec. 512(c)

The employees listed above can be exempt from the meal requirement in Labor Code section 512(a) if:

- They are covered by a valid collective bargaining agreement, and that agreement provides for the wages, hours of work, and working conditions.
- The agreement explicitly provides for meal periods for those employees.
- The agreement provides for final and binding arbitration of disputes about the meal period provisions, premium wage rates for overtime.
- They are paid a regular hourly rate of pay not less than 30 percent more than the state minimum wage.

Further Information

The DLSE *Enforcement Policies and Interpretations Manual* is available at www.dir.ca.gov/DLSE/manual-instructions.htm.

Chapter 13

Overtime

This chapter provides a detailed explanation of the rules and exceptions for paying overtime in California. California laws favor employees more than federal rules and exceptions.

This chapter includes the following topics:

- Basic overtime requirements, including the California daily overtime law
- Workday and workweek definitions and why it is important to properly define and understand them
- Overtime calculation, including complex examples
- Mandatory overtime, when it can and cannot be required
- Makeup time — unique provisions in California to provide flexibility to employees and save you overtime costs
- Compensatory time off, who can and cannot have it
- Exceptions for specific industries

You may be able to use alternative workweek options to avoid daily overtime to some degree. For more information, see Chapter 14, "Alternative Workweek Scheduling."

Understanding Basic Overtime Requirements

For almost all nonexempt private sector California employees who are not covered by collective bargaining agreements, overtime pay is based primarily on the number of hours worked in a day. You must also account for weekly totals when calculating overtime. For information on which employees are exempted from overtime pay, see Chapter 4, "Exempt and Nonexempt."

New 2016

In June of 2015, the Department of Labor submitted proposed revisions to the federal overtime rules, including revising the federal minimum salary threshold. These proposed rules could potentially impact California employers; the proposed federal overtime rules would contain a minimum salary threshold for exempt status that is higher than California's requirement. If finalized, impacted employers would need to analyze current positions to determine exempt/nonexempt status and whether overtime must now be provided under federal law. It is unlikely that any rules will be finalized before the spring of 2016.

Overtime Posting Requirements

You must post the applicable Wage Order(s) for your business where all employees can see them. The Wage Orders include overtime and other employee pay rules. For more information on overtime and other posting requirements, see "Posters" in Chapter 2, page 5, and "California's Wage Orders" in Chapter 10, page 218.

Daily Overtime — California Law

This section provides a brief summary of California and federal overtime pay requirements. For industry-specific exceptions, see "Overtime Exceptions for Specific Industries" on page 356.

- You must provide 1.5 times the employee's regular rate of pay for:
  - All hours worked beyond eight in a single workday
  - The first eight hours worked on the seventh consecutive day worked in a single workweek
- You must pay double the employee's regular rate of pay for both:
  - All hours worked beyond 12 in a single workday
  - The hours worked beyond eight on the seventh consecutive day worked in a single workweek

For definitions of what constitutes a workday or workweek, see "Workday Defined" on page 344 and "Workweek Defined" on page 345.

It is a misdemeanor to require a minor to work more than eight hours in any one workday, regardless of whether you pay overtime.[1] For more information on restrictions on a minor's hours of work, see Chapter 7, "Employing Minors."

Weekly Overtime — California and Federal Law

To calculate weekly overtime, multiple the employee's regular rate of pay by 1.5 for all hours worked beyond 40 straight-time hours in a workweek.

Seventh Day of the Workweek

The definition of "workweek" is extremely important when calculating overtime under the "seventh-day" rule. The seventh-day rule applies only on the last day of your defined workweek, not any time an employee works seven consecutive days.

The seventh consecutive day worked in a workweek is paid differently than the first six days. On the seventh consecutive day worked in a single workweek you must pay an employee:

- Time and one-half the regular pay rate for the first eight hours worked.
- Double the regular pay rate for all hours worked beyond eight.

Example: You define a workweek as Sunday through Saturday. An employee works 4 hours each day from Sunday through Friday and then works 10 hours on Saturday. Saturday is the seventh consecutive day worked in the workweek. The employee receives eight hours pay at time and one-half and two hours pay at double-time.

	Sun	**Mon**	**Tues**	**Wed**	**Thur**	**Fri**	**Sat**	**Total**
Hours	9 a.m.- 1 p.m.	9 a.m.- 1 p.m.	9 a.m.- 1 p.m.	9 a.m.- 1 p.m.	9 a.m.- 1 p.m.	9 a.m.- 1 p.m.	9 a.m.- 7:30 p.m.	
Total	4	4	4	4	4	4	10*	34
Wages Due								
1.0x	4	4	4	4	4	4	0	24

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[1] Lab. Code sec. 1392

	Sun	Mon	Tues	Wed	Thur	Fri	Sat	Total
1.5x	0	0	0	0	0	0	8	8
2.0x	0	0	0	0	0	0	2	2

Example: You define a workweek as Sunday through Saturday. The seventh-day rule applies only on Saturdays. If an employee works Wednesday through Tuesday, Tuesday does not count as the seventh consecutive day in that workweek.

How you define your workweek will impact your obligation to pay overtime. For more information, see "Workweek Defined" on page 345.

New 2016

In addition, there are important questions regarding mandatory days off currently pending before the California Supreme Court. For more information, see "Mandatory Days Off" in Chapter 12, page 306.

Exception: Wage Orders 14 and 15 do not require overtime pay on the seventh day in a workweek, provided that the employee does not work over six hours per day and that the total hours for the week do not exceed 30. If the employee works over these specified hours, overtime pay is required.

Straight-Time Hours Defined

"Straight-time" is normal working hours that are paid at a regular rate. Only hours worked at straight-time apply to the weekly 40-hour limit on hours worked. That is, overtime hours do not apply to the weekly 40-hour limit on hours worked.

Applying only straight-time hours to the 40-hour workweek prevents overtime from pyramiding, where an employee earns overtime on top of overtime already paid. Once an employee has been paid overtime for working more than eight hours in a day, those overtime hours do not count toward the weekly 40-hour limit.

Example: An employee works 10 hours each day Monday through Thursday. You owe the employee eight hours of straight-time and two hours of overtime pay for each of those days. When that employee comes in on Friday morning, although he/she already worked 40 hours in the workweek, he/she has worked only 32 hours of straight-time. He/she does not begin earning weekly overtime until after he/she works eight more hours of straight-time in that workweek.

Nonresidents Entitled to Overtime for Work in California

According to the California Supreme Court, California overtime laws protect nonresident employees when they perform work in California for California-based employers.[2]

Oracle, a California-based software company, employed non-residents as software training instructors. Although the employees did not live in California, they performed work as training instructors in California and other states.

The employees claimed that they were not paid overtime for days that they worked in California. Oracle chose to apply the wage and hour laws of the state in which the employees lived, rather than California law.

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[2] *Sullivan v. Oracle Corporation*, 51 Cal. 4th 1191 (2011)

The California Supreme Court determined that California's overtime provisions apply to any employee who works in California for a California based employer.[3]

The California Supreme Court also found that California's Unfair Competition Law (UCL) applies to the overtime work described above. The effect of this ruling is to allow plaintiffs to use the UCL's longer four-year statute of limitations for bringing actions, instead of the three-year limitations period that would normally apply.

Because the court's decision was limited specifically to the facts of this particular case, the ruling does not resolve many related questions, which will likely be the subject of future litigation:

- Does this ruling apply to partial days worked in California or only full days?
- Are out-of-state employees subject to other laws, such as meal and rest breaks and paycheck requirements?
- Does this ruling apply to companies who are not based in California, but who send employees to work in California?

California employers should exercise caution to avoid costly wage-and-hour litigation:

- Closely track hours worked for all employees;
- Abide by state overtime laws for nonresidents working in the state; and
- Seek legal advice with any questions relating to paying nonresident workers.

Defining Workdays and Workweeks

It is important to define your workday and workweek. These definitions impact your obligations to pay your employees overtime.

For example, you can define a workweek as Monday through Sunday. An employee can work ten, 8-hour days in a row — from Wednesday of the first workweek to Friday of the next workweek. Five of those days are in one workweek and five in the next workweek. The employee did not exceed 40 hours in a single workweek. Therefore, the employee doesn't receive overtime pay. You pay him/her the straight hourly wage. However, any hours worked in excess of eight per day are compensated at an overtime rate.

Workday Defined

A workday is not simply the hours an employee normally works; for example, 8:00 a.m. to 5:00 p.m., Monday through Friday. A "workday" is any consecutive 24-hour period starting at the same time each calendar day.[4] The workday can begin at any hour of the day. Unless you specifically designate another starting time, such as 4:00 p.m. each day, the Labor Commissioner presumes a workday of 12:01 a.m. to midnight, as does the U.S. Department of Labor's Wage and Hour Division.

You can define different workdays for different groups of employees. After you define a workday, it must remain consistent and unchanged for that employee until there is a legitimate business reason for a change. For example, the workday can change if the employee is promoted to a different location that has a different workday defined.

Daily overtime is based on the number of hours worked in a single workday. An employee on a traditional 12:01 a.m. to midnight workday could work 16 hours straight without being paid overtime, if he/she worked 3:30 p.m. until midnight and then continued working from midnight to 8:30 a.m. (this example assumes a 30-minute unpaid meal break in each workday). The legal definition of workday is in the Industrial Welfare Commission (IWC) Wage Orders.

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[3] Business and Professions Code sec. 17200

[4] DLSE *Enforcement Policies and Interpretations Manual* sec. 55.8

Workweek Defined

A "workweek" is any 7 consecutive 24-hour periods starting on the same calendar day each week.[5] Unless you specifically designate another workweek, the Labor Commissioner presumes a workweek of Sunday through Saturday.

The workweek can be different for different groups of employees. After you define a workweek, it must remain consistent and unchanged for that employee until there is a legitimate business reason for a change.

The legal definition of workweek is in the IWC Wage Orders.

However, workweek designations that are not supported by legitimate business reasons, and are designed in a manner to primarily avoid paying overtime, are prohibited.

Definition of Workweeks for Scheduling and Compensation Must Match

A California court ruled that employers cannot artificially designate the workweek in order to circumvent the statutory requirement to pay overtime for the seventh consecutive day worked in a workweek. Employers can only designate a workday or workweek that differs from the employee's assigned schedule if there is a legitimate business reason for doing so. For instance, if the employer established an assigned schedule that ran from Tuesday to Tuesday, the employer cannot state that its workweek for purposes of calculating overtime is actually Monday through Sunday simply to avoid paying overtime.[6]

Calculating Overtime

The trickiest part of payroll administration is calculating overtime. First, identify the hours that you must pay on an overtime basis. Second, decide what overtime rate must be applied. Third, determine the regular rate to which overtime must be applied.

For more information on some of the more common situations you may face, see "Overtime Examples" on page 349 The *Overtime Calculation Worksheet* can also be used to assist you in calculating overtime for your nonexempt employees.

Overtime Calculation Worksheet

Regular Rate of Pay Defined

The basis for calculating overtime is the employee's regular rate of pay. The regular rate is not always an employee's normal hourly amount. "Regular rate" is the employee's actual rate of pay, including all hourly earnings, plus many other types of compensation.

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[5] DLSE *Enforcement Policies and Interpretations Manual* sec. 55.8

[6] *Seymore et. al. v. Metson Marine, Inc. et. al.*, 194 Cal. App. 4th 361 (2011)

The regular rate must include almost all forms of pay that the employee receives, including commissions, production bonuses, piece work earnings and the value of meals and lodging. Base overtime on the employee's regular rate of pay, including all of the forms of payment listed.[7]

The following payments are **not** included in the regular rate of pay:

- Gifts, such as those received for holidays or birthdays or as a reward for service, the amounts of which are not based on hours worked, production or efficiency
- Hours paid but not worked, such as vacation, holidays, sick leave, reporting time, split shift pay and extra hour premium pay for failure to provide meal or rest breaks
- Reimbursement of expenses
- Discretionary bonuses, which are typically awarded in recognition of services performed during a given period. These bonuses occur at your sole discretion. You decide the bonus amount and timing of the payment
- Profit-sharing plans, which are payments made in recognition of services performed during a given period to a profit-sharing plan or trust or bona fide thrift or savings plan, without regard to hours of work, production or efficiency
- Employee Retirement Income Security Act (ERISA) plan payments, such as irrevocable contributions for old age; retirement; life, accident or health insurance; or similar employee benefits
- Overtime premium pay[8]

If an employee's compensation is based in whole or in part on bonuses, commissions or multiple hourly rates, you must calculate the regular rate of pay for each workweek. The employee's overtime rate each week must be based on the regular rate of pay, not the normal hourly rate of pay.[9]

To calculate the regular rate of pay, divide compensation for the week by the total number of hours worked. Compensation can include multiple hourly rates, bonuses and commissions.[10]

To calculate a full-time salaried nonexempt employee's regular rate, divide the total weekly regular compensation (salary) by 40.[11]

If you pay employees by a piece rate or commission:

- To calculate the regular rate of pay, divide the total earnings for the week by the total of hours worked. Include the overtime hours in the earnings and hours. For each overtime hour worked, the employee is entitled to an additional one-half the regular rate (time and one-half) or to an additional full rate (double-time).
- For piece workers, you can calculate the regular rate of pay as a group rate. Divide the total number of pieces the group produces by the number of people in the group. Pay each person accordingly. To determine the regular rate for each worker, divide the pay received by the number of hours worked.

The regular rate of pay cannot be less than the minimum wage.[12]

Regular Rate for More Than One Rate of Pay — Weighted Average Method

You can pay different rates for different jobs, if the work involved is objectively different. In addition, you can pay for nonproductive time, such as time spent traveling, at a different rate. For more information, see "Travel Time" in Chapter 12, page 307. You must give employees previous notice of the lower rate.[13]

When an employee with more than one rate of pay works overtime, you must calculate the employee's regular rate of pay to determine the overtime rate.[14]

The method used is called the weighted average method.

Where two rates of pay are paid during a workweek, the California method for determining the regular rate of pay for calculating overtime in that workweek mirrors the federal method, based upon the weighted average of all hourly rates paid. Initially, therefore, it must be predicated upon the finding that there are established hourly rates being paid. The rate will be established by adding all hours worked in the week and dividing that number into the total compensation for the week. Since the hourly rates have already been established and what needs to be established now is the weighted average of those rates for purposes of overtime payment.[15] For more information, see "Calculating Overtime for Hourly Employees" on page 347.

Exception to Weighted Average

In the situation where an employee is paid two rates during the course of the day and one of those rates is a statutorily-mandated rate (i.e., prevailing wage), the regular rate for calculating the overtime rate for work performed on the public works project must be based on the higher of either the weighted average or the prevailing wage rate in effect at the time that the work is performed. (It would be very unusual for the weighted average to be higher than the prevailing wage rate, but it is possible.)[16]

> **Example:** If an employee is employed in a workweek for some hours on a private construction job at $14 per hour and then employed other hours on a public work project at $28 per hour, any overtime performed on the public work site must be compensated at the overtime rate required by the prevailing wage determination in effect on that project for the craft.

If the overtime is performed on the non-public work project, the weighted average of the public works rate of pay and the non-public works rate of pay is the regular rate to be used in the calculation of the overtime.[17]

For a discussion on paying nonexempt employees for paid sick leave at the regular rate of pay, see "Calculating Leave - Employer Options" in Chapter 20, page 537.

Calculating Overtime for Hourly Employees

For hourly employees, the overtime rate must be based on the employee's regular rate of pay.

When an employee works overtime and earns time and one-half, he/she receives the hourly rate plus one-half of the regular rate of pay. When the employee earns double-time, he/she receives the hourly rate plus the full regular rate of pay.

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[13] DLSE Opinion Letter 1994.02.03-3

[14] DLSE Opinion Letter 1994.02.03-3

[15] DLSE *Enforcement Policies and Interpretations Manual* sec. 49.2.5; *Skyline v. Department of Industrial Relations,* 165 Cal. App. 3d 239 (1985)

[16] DLSE *Enforcement Policies and Interpretations Manual* sec. 49.2.6

[17] DLSE *Enforcement Policies and Interpretations Manual* sec. 49.2.6.1

Overtime For Employees With Two Rates of Pay

An employee can earn more than one hourly rate. For example, an employee normally earns $12 per hour working at trade shows and $10 per hour for travel time. In one week, the employee works 40 hours at a trade show and spends 10 hours traveling.

- Total hours = 50
  - $12/hour x 40 hours = $480
  - $10/hour x 10 hours = $100
  - $480 + $100 = $580 (total weekly compensation before adding overtime premiums or weighted average)
- $580 ÷ 50 hours (total hours) = $11.60 (regular rate of pay)
- $11.60 ÷ 2 = $5.80 (overtime premium for time and one-half)

Based on the calculations above, you would pay the employee as follows:

- Time-and-one-half:
  - If the employee travels while time-and-one-half is due (for example, the ninth hour of a day), he/she would receive $15.80 per hour. This is the $10 travel rate plus the $5.80 overtime premium.
  - If the employee performs his/her regular duties while time-and-one-half is due, he/she would receive $17.80 per hour. This is the $12 rate he/she normally earns, plus the $5.80 overtime premium.
- Double-time:
  - If the employee travels while double-time is due (for example, the 13th hour of a day), he/she would receive $21.60 per hour. This is the $10 travel rate plus the $11.60 regular rate of pay.
  - If the employee performs his/her regular duties while double-time is due, he/she would receive $23.60 per hour. This is the $12 rate he/she normally earns, plus the $11.60 regular rate of pay.

This example presumes only two rates of pay. When more than two rates apply, multiply the additional rates by the number of hours worked at those rates and include them in the total weekly compensation. If other forms of compensation apply, such as bonuses or commissions, you must include them in the total weekly compensation as well.[18]

Calculating Overtime for Salaried Nonexempt Employees

Nonexempt employees can be paid a salary rather than an hourly or piece rate wage. However, placing a nonexempt employee on salary does not excuse you from paying overtime, reflecting the hours he/she worked and applicable rates on the pay stub or ensuring that the employee receives mandatory rest and meal breaks. You must require salaried nonexempt employees to record their daily hours. This record keeping allows you to pay for required overtime and protects you from claims about missed meal or rest breaks. For information on overtime for fixed salary employees, see "Fixed Salaries and Nonexempt Employees" in Chapter 11, page 248.

A full-time (40-hour), salaried nonexempt employee's regular hourly rate is 1/40th of his/her weekly salary. Use the regular hourly rate to calculate an employee's regular rate of pay. The employee's overtime rate is based on the regular rate of pay. The regular rate of pay includes the regular hourly rate plus most commissions, bonuses or other compensation. For more information, see "Regular Rate of Pay Defined" on page 345.

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[18] DLSE Opinion Letter 1992.05.14

The law does not specify how to calculate the hourly rate when a salaried nonexempt employee regularly or occasionally works fewer than 40 hours. It also does not tell you how to calculate the weekly salary when the employee's agreed upon salary is a monthly or yearly amount.

The definition of "full time" as 40 hours per week applies only to this particular pay calculation. You retain the option to define "full time" as fewer than 40 hours for all other purposes, such as eligibility for employee benefits.

Hours Paid But Not Actually Worked

Hours paid for vacations, holidays, sick leave, etc., are not actually worked by the employee. Therefore, these hours are not considered when calculating overtime.[19] For example, an employee is paid eight hours for the Thanksgiving holiday (Thursday). He/she then works eight-hour days on Monday, Tuesday, Wednesday, Friday and Saturday that same week. The employee is paid for 48 straight-time hours for the week. Base overtime strictly on hours worked, not hours paid. For more information, see "Straight-Time Hours Defined" on page 343.

Overtime Examples

Calculating daily and weekly overtime can be confusing, especially with the many changes to California's overtime laws. The following examples show the proper overtime calculations in six common situations.

Note: These examples do not take into account legally required meal breaks. Remember that a 30-minute, unpaid meal break is generally required for shifts of more than six hours. For more information, see "Meal and Rest Breaks" in Chapter 12, page 316.

Overtime Example 1

The employee worked Monday through Friday. She worked overtime on three of those days. She earns eight hours of straight-time each day. She earns overtime at time and one-half for two hours on Tuesday, one hour on Wednesday and three hours on Thursday. The overtime hours on Tuesday, Wednesday and Thursday do not count toward the weekly overtime requirement, because they were already paid at an overtime rate. Thus, her employer need not pyramid weekly overtime on top of daily overtime that has already been paid. The employee took a 30-minute meal break each day and waived the second meal break where applicable.

	Sun	**Mon**	**Tues**	**Wed**	**Thur**	**Fri**	**Sat**	**Total**
Hours	off	8 a.m. - 4:30 p.m.	8 a.m. - 6:30 p.m.	8 a.m. - 5 p.m.	7 a.m. - 5:30 p.m.	8 a.m. - 4:30 p.m.	off	
Total	0	8	10	9	11	8	0	46
Wages Due								
1.0x	0	8	8	8	8	8	0	40
1.5x	0	0	2	1	3	0	0	6
2.0x	0	0	0	0	0	0	0	0

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[19] DLSE *Enforcement Policies and Interpretations Manual* sec. 49.1.2.4

Overtime Example 2

The employee works six days this week. Overtime is due for all days except Sunday and Wednesday. On Tuesday, he works more than 12 hours, so he earns time and one-half for hours 9 through 12 and double-time for the hour 13. When he comes in on Friday morning, he has already completed 40 hours of straight time in the workweek. Therefore, he earns time and one-half for his first 12 hours on Friday and double-time for the 13th hour. The overtime paid for Sunday through Thursday does not count toward the weekly overtime requirement, because it has already been paid at an overtime rate. Thus, his employer need not pyramid weekly overtime on top of daily overtime that has already been paid. The employee took a 30-minute meal break each day, two meal breaks of 30 minutes on Tuesday and Friday and waived the second meal break when possible.

	Sun	**Mon**	**Tues**	**Wed**	**Thur**	**Fri**	**Sat**	**Total**
Hours	3 p.m. - 11:30 p.m.	3 a.m. - 2:30 p.m.	3 a.m. - 5 p.m.	3 p.m. - 11:30 p.m.	3 a.m. - 2:30 p.m.	3 a.m. - 5 p.m.	off	
Total	**8**	**11**	**13**	**8**	**11**	**13**	**0**	**64**
Wages Due								
1.0x	8	8	8	8	8	0	0	40
1.5x	0	3	4	0	3	12	0	22
2.0x	0	0	1	0	0	1	0	2

Overtime Example 3

The employee works the swing shift, usually starting work at 8:00 p.m. each evening and working into the morning of the next calendar day. Thus, each shift is partially in one workday and partially in another. On Sunday, even though she works a nine-hour shift, only four of those hours are on the first workday (Sunday). The hours from 12:00 a.m. until she goes home at 5:00 a.m. count toward the second workday (Monday). The hours she works when she returns to work from 8:00 p.m. until midnight on Monday also count toward the second workday. This entitles her to overtime at time and one-half on Monday, Tuesday and Wednesday. On Friday, even though she comes in and works a 10-hour shift, she earns no overtime on that shift, because four hours of the shift fall on the sixth workday (Friday) and six hours of the shift fall on the seventh workday (Saturday). The employee took a 30-minute meal break when required and waived her meal breaks on days when she worked six hours or less.

	Sun	**Mon**	**Tues**	**Wed**	**Thur**	**Fri**	**Sat**	**Total**
Hours	8 p.m. - 12 a.m.	12:30 a.m. - 5:30 a.m. 8 p.m. - 12 a.m.	12:30 a.m. - 5 a.m. 8 p.m. - 12 a.m.	12 a.m. - 6:30 a.m. 8 p.m. - 12 a.m.	off	8 p.m. - 12 a.m.	12 a.m. - 6 a.m.	
Total	**4**	**9**	**9**	**10**	**0**	**4**	**6**	**42**
Wages Due								
1.0x	4	8	8	8	0	4	6	38
1.5x	0	1	1	2	0	0	0	4
2.0x	0	0	0	0	0	0	0	0

To avoid the confusion caused by working on two workdays each shift, in this example, the employer could change the definition of the workday and workweek for employees on the swing shift. The employer could define their workday from 7:00 p.m. to 6:59 p.m., each day and define the workweek starting at 7:00 p.m. on Sunday. However, this will require the employer to track more than one workday and one workweek.

Overtime Example 4

The employee works all seven days this week. Although the law requires one day's rest in seven, an employee can take the day off later in the calendar month if the nature of the work reasonably requires that the employee work seven or more consecutive days. He is entitled to daily overtime from Sunday through Thursday. He earns time and one-half for hours 9 through 12 each day and double-time for the hours 13 and beyond. On Friday when he comes into work, he already completed 40 hours of straight time in the workweek. He earns time and one-half for the first 12 hours on Friday and double-time for the 13th hour. Because he works seven consecutive days in this workweek, his employer pays his first eight hours on Saturday at time and one-half and the remaining hours at double-time. The overtime he is paid for Sunday through Thursday does not count toward the weekly overtime requirement because it has already been paid at an overtime rate. His employer need not pyramid weekly overtime on top of daily overtime, which has already been paid. The employee took a 30-minute meal break each day. He took two meal breaks on Monday, Tuesday, Thursday, Friday and Saturday. He waived the second meal breaks when possible.

	Sun	**Mon**	**Tues**	**Wed**	**Thur**	**Fri**	**Sat**	**Total**
Hours	6 a.m. - 5:30 p.m.	6 a.m. - 10 p.m.	6 a.m. - 11 p.m.	6 a.m. - 4:30 p.m.	6 a.m. - 7 p.m.	6 a.m. - 8 p.m.	6 a.m. - 8 p.m.	
Total	**11**	**15**	**16**	**10**	**13**	**13**	**13**	**91**
Wages Due								
1.0x	8	8	8	8	8	0	0	40
1.5x	3	4	4	2	4	12	8	37
2.0x	0	3	4	0	1	1	5	14

Overtime Example 5

The employee works all seven days in this workweek, between two and four hours each day, working a total of 16 hours. Because she worked seven consecutive days in the workweek, the seventh-day rule applies. The seventh-day rule requires time and one-half for the first eight hours on the seventh consecutive day an employee works in a workweek. She waived all meal breaks because she worked less than six hours each day.

	Sun	**Mon**	**Tues**	**Wed**	**Thur**	**Fri**	**Sat**	**Total**
Hours	1 p.m. - 3 p.m.	1 p.m. - 3 p.m.	1 p.m. - 4 p.m.	1 p.m. - 5 p.m.	1 p.m. - 3 p.m.	1 p.m. - 5 p.m.	1 p.m. - 4 p.m.	
Total	**2**	**2**	**3**	**4**	**2**	**4**	**3**	**20**
Wages Due								
1.0x	2	2	3	4	2	4	0	17
1.5x	0	0	0	0	0	0	3	3
2.0x	0	0	0	0	0	0	0	0

Overtime Example 6

The employee works five days in this workweek. He works eight hours per day. He takes Thursday as a paid vacation day. He is paid 48 straight-time hours in this workweek. The employer applies overtime only to hours actually worked. Although he was paid for 48 hours in the workweek, he actually worked only 40 hours, so he did not earn any overtime. He took a 30-minute meal break each day that he worked.

	Sun	**Mon**	**Tues**	**Wed**	**Thur**	**Fri**	**Sat**	**Total**
Hours	off	9 a.m. - 5:30 p.m.	9 a.m. - 5:30 p.m.	9 a.m. - 5:30 p.m.	Vacation (8)	9 a.m. - 5:30 p.m.	9 a.m. - 5:30 p.m.	
Total	**0**	**8**	**8**	**8**	**(8)**	**8**	**8**	**40**
Wages Due								
1.0x	0	8	8	8	8	8	8	48
1.5x	0	0	0	0	0	0	0	0
2.0x	0	0	0	0	0	0	0	0

Requiring Mandatory Overtime

Usually, employees cannot refuse your request that they work overtime. There are not any general laws or regulations that govern mandatory overtime. However, there are limitations under certain Wage Orders and union contracts. Your organization policy can also place limitations on mandatory overtime.

When faced with overtime needs, request volunteers among qualified employees. Require overtime only in the absence of volunteers. If an employee refuses your overtime request, you can take disciplinary action.

Limitations on mandatory overtime are included in specific Wage Orders. The following Wage Orders limit the maximum number of hours in a week and prohibit the employer from demanding overtime hours that exceed these limitations:

- Wage Order 3, Canning, Freezing and Preserving Industry — An employee can work up to a maximum of 72 hours in 7 consecutive days after which the employee shall have a 24-hour period off duty.
- Wage Order 4, Professional, Technical, Clerical, Mechanical and Similar Occupations — No employee shall be terminated or otherwise disciplined for refusing to work more than 72 hours in any workweek, except in an emergency.
- Wage Order 8, Industries Handling Products After Harvest — An employee can work up to a maximum of 72 hours in any workweek after which the employee shall have a 24-hour period off duty, except:
    - In the grape and tree fruit industry, the following key personnel — receivers, loaders, fork lift operators, shipping clerks and maintenance workers — may be exempt from the mandatory day off requirement.
    - In the cotton ginning industry and in the tree nut hulling and shelling industry, all employees shall have the voluntary right to be exempt from the mandatory day off provision in this order. Any employee who wants to exempt himself/herself from the mandatory day off provision may exercise that exemption by notifying you in writing. Any employee who wants to withdraw that exemption may do so by notifying you in writing at least five days before the

desired day off. (This notice provision is not intended to be applicable to instances of illness or emergencies).

  - In the exercise of any exemption from the mandatory day off provided above or by action of the Labor Commissioner, you cannot discriminate against any employee who wants to take 24 hours off after 72 hours worked in a workweek. Administrative exemptions from the mandatory day off are permitted by Labor Code section 1198.3 under certain conditions.
  - All employers who permit any employees to work more than 72 hours in a workweek must give each employee a copy of the applicable provision for exemption, including subparagraph (c) above in English and in Spanish, and post it at all times in a prominently visible place.

- Wage Order 13, Industries Preparing Agricultural Products for Market, on the Farm — Any work by an employee in excess of 72 hours in any one workweek must be voluntary. No employee can be terminated or discriminated against for refusing to work more than 72 hours in any one workweek.
- Wage Order 16, Certain On-Site Occupations in the Construction, Drilling, Logging and Mining Industries — No employee can be terminated, disciplined or otherwise discriminated against for refusing to work more than 72 hours in any workweek, except in an emergency.

Using Makeup Time

Upon an employee's request, you can allow makeup time under certain conditions. Makeup time allows an employee to request time off for a personal obligation and make up the time without receiving overtime pay. You are not obligated to allow makeup time.

Makeup Time Guidelines

If you choose to allow makeup time, you must comply with the following rules:

- While you can inform an employee of the makeup time option, you cannot encourage or otherwise solicit an employee to request the employer's approval for makeup time.
- An employee can work no more than 11 hours on another workday, and no more than 40 hours in a workweek, to make up the time off.
- The time must be made up within the same workweek.
- The employee must provide you with a signed, written request for each occasion that he/she desires makeup time.

  Exception:
  If an employee knows in advance that he/she will be requesting makeup time for a personal obligation that will recur at a fixed time over a succession of weeks, he/she can request to make up work time for up to four weeks in advance. For a recurring obligation, a written request must be made every four weeks. The makeup work must be performed in the same workweek that the work time was lost. For example, an employee who wants to leave an hour early every Monday and Wednesday afternoon for a college course can turn in one makeup time request every four weeks, rather than two requests per week.

If an employee requests time off for a personal obligation, but does not submit the written request that is required for makeup time, you can inform the employee of the makeup time option. However, because you are prohibited from "encouraging or otherwise soliciting" an employee to request makeup time, you cannot condition granting the employee's request for time off on his/her agreement to submit a written request for making up the time. If the employee does not want to make up the time, you can grant or deny the request based on organization policy and business needs.

On occasion, after working makeup time to take time off later in the week, an employee may decide not to take the time off after all. You are not liable for daily overtime pay for the makeup time that was worked if the employee did not end up working more than 40 hours that workweek, nor more than 11 hours in any workday.[20] This is based on an opinion letter from the DLSE. Courts may choose not to follow this opinion letter. Employers may wish to pay the overtime pay for the makeup time or seek the advice of counsel.

Time Records for Makeup Time

When using makeup time, maintain a time record system that shows which hours you pay at an overtime rate and which hours you pay at straight-time for makeup time.

You can require that the employee attach a copy of the signed makeup time requests for that pay period to his/her timecard when he/she turns it in at the end of the period.

Makeup Time Versus Alternative Workweek

You cannot require or encourage employees to submit makeup time requests each week to create an alternative workweek schedule, without complying with the legal requirements for creating an alternative workweek; using makeup time in this manner violates the law.

On the other hand, neither the law nor IWC Wage Orders limit the number or frequency of makeup time requests each employee is allowed. An employee could submit a request each week and, with your approval, work more than eight hours a day on a regular basis without receiving overtime pay.

Makeup Time Example

An employee might request three hours off on Monday to go to a physician's appointment. The employee might then make up the time by working:

- 11 hours on Tuesday or any other day during that workweek.
- One extra hour each day on Tuesday, Wednesday and Thursday, or any combination of days during that workweek.

The employee is limited to 11 hours per day and 40 hours per week when working makeup time.

Makeup Time Checklist

Makeup Time Request

Makeup Time Request - Spanish

Compensatory Time Off

A private employer in California is not permitted to offer compensatory time off (CTO) to nonexempt employees in lieu of paying overtime, unless the employer is one of the rare few exempt from the federal Fair Labor Standards Act (FLSA).[21] If you are covered by the FLSA, you are prohibited from offering employees CTO in lieu of overtime. For more information on FLSA coverage, see "Who Is Covered By the FLSA?" in Chapter 10, page 238.

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[20] DLSE Memorandum of December 23, 1999, "Understanding AB 60: An In Depth Look at the Provisions of the Eight Hour Day Restoration and Workplace Flexibility Act of 1999"

[21] DLSE *Enforcement Policies and Interpretations Manual* secs. 6.1, 6.1.1

You can offer CTO only if you are not covered by the FLSA and if you can take advantage of an extremely limited exception contained in the following Wage Orders:

- Wage Order 2, Personal Services Industry
- Wage Order 4, Professional, Technical, Clerical, Mechanical and Similar Occupations
- Wage Order 6, Laundry, Linen Supply, Dry Cleaning and Dyeing Industry
- Wage Order 7, Mercantile Industry
- Wage Order 9, Transportation Industry
- Wage Order 11, Broadcasting Industry
- Wage Order 12, Motion Picture Industry
- Wage Order 15, Household Occupation

If you meet these criteria, you can offer CTO at applicable overtime rates if the following four conditions are met:

- The CTO is provided pursuant either to a collective bargaining agreement or to a written agreement that you and your employee entered into before the work was performed. The employee has not accrued more than 240 hours of CTO.
- The employee requests, in writing, CTO in lieu of overtime compensation.
- You regularly schedule the employee to work no fewer than 40 hours in a workweek.[22]

You must permit the employee to use the accrued time within a reasonable period after making the request, if such use does not unduly disrupt your operations.[23]

To determine if you have granted a request to use CTO within a reasonable period, consider the following factors:

- The normal work schedule
- Anticipated peak work loads based on experience
- Emergency requirements for staff and services
- The availability of qualified substitute staff[24]

You must pay overtime to employees who accrued 240 hours of CTO for any additional overtime work hours.[25] Keep accurate records reflecting CTO earned and used.

You must pay CTO at the employee's regular rate when the employee receives payment.[26] Upon terminating employment, the payment rate for unused CTO can be either the employee's final regular rate or the employee's average regular rate for the last three years of employment, whichever is higher.[27]

At the employee's request, you must pay overtime in cash in lieu of earned CTO for at least two pay periods.[28]

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[22] Lab. Code secs. 204.3(a) and (b)

[23] Lab. Code sec. 204.3(e)(1)

[24] Lab. Code sec. 204.3 (e)(3)

[25] Lab. Code sec. 204.3 (c)(1)

[26] Lab. Code sec. 204.3 (c)(2)

[27] Lab. Code sec. 204.3(d)

Limits on Use of CTO by Public Employees

According to a decision of the U.S. Supreme Court in *Christensen, et al. v. Harris County, et al.*, public employers can require employees to use accrued CTO. The case stemmed from a policy adopted by the sheriff's department in Harris County, Texas, which required employees to begin taking scheduled CTO to reduce the amount of time that had been accrued. The U.S. Supreme Court held that nothing in the FLSA or its implementing regulations prohibits public employers from forcing employees to use accrued CTO.[29]

Compensatory Time Off and Exempt Employees

CTO regulations do not apply to exempt employees. For more information on exempt versus nonexempt employees, see Chapter 4, "Exempt and Nonexempt." However, if you provide an exempt employee with formal CTO — hour-for-hour or day-for-day — you would likely invalidate that employee's exempt status.

Overtime Exceptions for Specific Industries

The IWC Wage Orders for specific industries contain some exceptions to the general rules for calculating overtime and premium pay. If you are in one of those industries, familiarize yourself with those exceptions to avoid penalties and save money. Some Wage Orders also limit the number of hours that can be worked in a week. For more information, see "Requiring Mandatory Overtime" on page 352.

Overtime for Domestic Work Employees/Personal Attendants

Under the Domestic Worker Bill of Rights, a "domestic work employee who is a personal attendant" will be eligible for overtime at one and one-half times the employee's regular rate of pay if the employee works more than nine hours in any workday or more than 45 hours in the workweek.[30] This rule differs from California's normal overtime rule which requires nonexempt employees to be paid overtime for work in excess of eight hours in a workday or 40 hours in a workweek. For more information, see "Requirements for Domestic Service" in Chapter 11, page 300.

The overtime provision applies only if worker qualifies as both a "domestic work employee" and a "personal attendant."

! Employers in this industry will need to carefully determine whether the Domestic Worker Bill of Rights applies to them. The law contains many specific definitions and exclusions. Employers in this industry should also be aware that the federal Department of Labor has created new rules that relate to domestic workers that went into effect in 2015. Remember that when both federal and state law apply, the employer must follow the most restrictive law.

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28. Lab. Code sec. 204.3(e)(2)
29. *Christensen, et al. v. Harris County, et al.*, 529 US 576 (2000)
30. Lab. Code sec. 1454

Overtime for Private School Teachers

California provides a state overtime exemption for teachers at private elementary or secondary academic institutions. The employee must meet all of the following requirements:

- The employee must be primarily engaged in the duty of teaching, instructing or lecturing to impart knowledge to students.
- The employee must earn a monthly salary equivalent to not less than two times the state minimum wage.
- The employee must customarily and regularly exercise discretion and independent judgment in performing the duties of a teacher.
- The employee must have attained either:
  - A Baccalaureate or higher degree from an accredited institution of higher learning.
  - Current compliance with the requirements set forth by the California Commission on Teacher Credentialing or the equivalent certification authority in another state for obtaining a preliminary or alternative teaching credential.

Overtime in Hospitals

Hospitals and other institutions primarily engaged in the care of the sick, aged or mentally ill who reside on the premises can agree with employees to create a work period of 14 consecutive days instead of a 7-day workweek. If they reach an agreement, employees are entitled to time and one-half their regular rate for all work beyond 80 hours in the 14-day work period.[31] Employers are still subject to the overtime requirements for work in excess of eight hours in one day (time and one-half) or 12 hours in one day (double time).[32]

Employees of licensed hospitals are subject to daily overtime. However, these employees can vote to implement an alternative workweek that allows up to 12 hours of work per day without daily overtime pay. Alternative workweeks for all other industries allow no more than 10 hours of work per day without daily overtime pay. For more information see "Alternative Workweek Schedules and Health Care" in Chapter 14, page 374.

Overtime for On-Site Construction, Drilling and Logging

In 2000, the Labor Commissioner and the IWC clarified that on-site construction, drilling and logging employees are covered by California's daily overtime laws. These employees were formerly exempt from daily overtime because they were not covered by the IWC Wage Orders, which regulate wages and hours of nonexempt employees in California.

Wage Order 16, Certain On-Site Occupations in the Construction, Drilling, Logging and Mining Industries, covers on-site construction, drilling, logging and mining employees. For more information, see "Wage Order 16 - On-Site Construction, Drilling, Logging and Mining Industries" in Chapter 10, page 228.

On-site employees often have long commute times to various worksites. An employee's commute time from home to the worksite is usually unpaid time and therefore not subject to overtime. For more information, including exceptions, see "Travel Time" in Chapter 12, page 307.

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[31] IWC Wage Order 5 sec. 3

[32] DLSE *Enforcement Policies and Interpretations Manual*, sec. 50.4.3

On-site mining, which was not previously covered by the IWC Wage Orders, is subject to daily overtime and limitations on hours through separate provisions of the state Labor Code.[33]

Overtime in Agriculture

Different overtime rules apply to employees working in agriculture.[34] Agricultural laborers earn overtime pay after working 10 hours per day or working the seventh consecutive day in a workweek. The overtime pay rate is 1.5 times straight pay after 10 hours per day and for the first 8 hours on the seventh consecutive workday in a workweek. The overtime pay rate is two times straight pay after eight hours on the seventh day. The one day of rest in seven requirement does not apply.[35]

Employees whose primary duties are those of an irrigator are not entitled to overtime.[36]

You must pay at least the minimum wage to all agricultural employees, even those who work piece work jobs.

Overtime in Transportation

Most long-haul truck drivers are exempt from standard overtime requirements, as are taxicab drivers and certain airline employees.[37] The FLSA provisions that cover hours and days of work do not apply to drivers of commercial vehicles that are regulated by the U.S. Department of Transportation (DOT).[38] DOT regulations do not provide for overtime for covered drivers. However, they do limit allowable driving time.

Drivers of commercial motor vehicles that are not regulated by DOT, whether or not they engage in interstate commerce, can be covered by state law.[39] However, state law also exempts drivers of the following vehicles from overtime that is otherwise mandated by state law:

- Motor trucks with more than two axles, truck tractors and all trailers, semitrailers and auxiliary, logging, pole or pipe dollies used in combination with them
- Two-axle motor trucks, excluding pickups, when coupled in any combination of vehicles exceeding 40 feet in length
- Buses, school buses, school pupil activity buses and farm labor vehicles[40]

Overtime and Collective Bargaining Agreements

Employees are exempted from statutory overtime requirements if they are covered by a collective bargaining agreement that:

- Explicitly provides for the employees' wages, hours and working conditions
- Pays premium rates for overtime hours
- Pays at least 30 percent more than the state minimum wage

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[33] Lab. Code sec. 751.8

[34] IWC Wage Order 14

[35] IWC Wage Ord

[36] IWC Wage Order 14

[37] IWC Wage Orders sec. 3

[38] 29 U.S.C. 213(b)

[39] DLSE *Enforcement Policies and Interpreta*

[40] 13 CCR sec. 1200

Overtime and Residential Care Employees

The IWC created an overtime exemption for certain residential care employees.[41] The exemption covers employees with direct responsibility for children receiving 24-hour residential care when those children are under 18 years of age; or not emancipated from the foster care system.

These residential care employees can be paid overtime as follows:

- 1.5 times the employee's regular rate of pay for all hours over 40 in the workweek
- Double the employee's regular rate of pay for all hours over 48 in the workweek
- Double the employee's regular rate of pay for all hours over 16 in a workday

The employee cannot work more than 24 consecutive hours until the employee receives at least 8 consecutive hours off duty immediately following the 24 consecutive hours of work. Time spent sleeping is not considered hours worked.

There are also meal and rest break exemptions for these residential care employees. For more information, see "Meal and Rest Break Exceptions for Residential Care" in Chapter 12, page 337.

Overtime and the Ski Industry

A ski establishment can institute a regularly scheduled workweek of not more than 48 hours during any month of the year when the establishment conducts Alpine or Nordic skiing activities, including snowmaking and grooming activities. You must compensate employees at not less than 1.5 times the employee's regular rate of pay for any hours worked in excess of 10 hours in a day or 48 hours in a workweek.

A "ski establishment" is an integrated, geographically limited recreational industry, which consists of basic skiing facilities and all related operations and facilities.[42]

Overtime and Commercial Passenger Fishing Boats

Employees of commercial passenger fishing boats are exempt from overtime pay when they perform duties as licensed crewmembers. Other employees in the industry, such as clerical and maintenance personnel, are entitled to overtime pay.

For information on minimum wage and off duty period requirements for the commercial fishing industry, see "Requirements for Fishing Crews" in Chapter 11, page 298.

Overtime for Mechanics

Auto mechanics paid a flat rate for each assigned job are *not* exempt from overtime pay. They are not considered to be working for a commission. A California Court of Appeal ruled that commissions are:

- Paid to any person for services rendered in the sale of an employer's property or services and not in making the product or service
- The amount of an employee's compensation is based on a percentage of the price of the product or service[43]

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[41] IWC Wage Order 5-2002 sec. 3

[42] IWC Wage Order 10

[43] *Keyes Motors, Inc. v. DLSE*, 197 Cal. App. 3d 557 (1987)

The court ruled that the mechanics were engaged in rendering a service, not selling it. The mechanic performs labor, not sales. Thus the mechanic's pay does not fit the definition of "commission," which is exempt from overtime rules.[44] Typically, the mechanic takes the customer's order, makes the repair and examines the auto for further problems. The mechanic has little or no contact with the customer. Therefore, the court ruled that the mechanic was not a salesperson, but a mechanic repairing an auto for a fee.

To calculate overtime payments to flat rate mechanics, add all of the mechanic's flat rate earnings and divide them by the total hours worked, even if that number is more than 40. The result is the mechanic's hourly wage for that week. Divide the hourly wage in half to determine the overtime premium. The result is the mechanic's time and one-half overtime pay.

> **Example:** If a mechanic earns $600 for 48 hours of work under the flat rate system, he/she earns $12.50 per hour — $600 divided by 48 hours. Half of that is $6.25 per hour, which equals the time and one-half rate of $18.75. The mechanic earns a sum of $50 for eight hours of overtime. The total due to this employee is $650.

Further Information

The California Labor Code, as well as the other state codes regulating wage and hour law, are available on the California Legislative Counsel website at www.leginfo.ca.gov/calaw.html. For more information, including the Industry Wage Orders, visit www.dir.ca.gov/IWC/iwc.html.

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[44] IWC Wage Order 7

Chapter 14

Alternative Workweek Scheduling

Alternative workweek scheduling is a feature unique to California. It allows nonexempt employees to work more than eight hours per day without requiring daily overtime payment. Such a schedule can be implemented after a vote of all employees in a work unit following proper disclosure and procedures set forth in law and the Industrial Welfare Commission (IWC) Wage Orders. Safeguards are provided for employees in the affected work unit who are unable to work the alternative workweek schedule.

This chapter provides a thorough explanation of alternative workweeks, including:

- The legal basis for alternative workweeks
- Types of alternative schedules
- Formal procedures required to implement alternative workweeks
- Rights of individual employees in the work unit
- Overtime in alternative workweek situations
- Terminating alternative workweek arrangements
- Exceptions to scheduling provisions as allowed by law

When you have an alternative workweek schedule in place, scheduling flexibility is greatly limited by the requirements that you must implement a regular work schedule and, generally, you must pay all hours worked outside that regularly scheduled workweek at an overtime rate.

You must follow the correct procedure when implementing an alternative workweek schedule. Failure to comply with even one requirement could cause the state Labor Commissioner to invalidate the alternative workweek schedule. If the schedule is invalid, you could be liable for awards of three to four years of back overtime to employees who worked the invalid alternative schedule.[1]

If you are considering alternative workweek scheduling, seek the advice of a competent employment law attorney who can assist you in developing and implementing the plan.

Alternative Workweek Defined

An "alternative workweek" is defined as "any regularly scheduled workweek requiring an employee to work more than eight hours in a 24-hour period."[2] An alternative workweek may be a single schedule or a menu of schedules from which an employee can choose. For more information, see "Propose an Alternative Schedule" on page 363.

Alternative workweek regulations apply to employees in Wage Orders 1-13 and 15-17.

Alternative workweeks apply only to nonexempt employees. Employees properly classified as exempt do not earn overtime. For more information on exempt and nonexempt status, see Chapter 4, "Exempt and Nonexempt."

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[1] Code of Civil Procedure sec. 338(a); Lab. Code sec. 1194; *Cortez v. Purolator Air Filtration Products Company*, 23 Cal. 4th 163 (2000

[2] Lab. Code sec. 500(c)

Flexible Schedule Versus Alternative Workweek

People often confuse flexible work schedules with alternative workweek schedules. A flexible schedule is a workweek schedule of eight hours per day where some employees begin the shift early in the day and others begin work later in the day. Some employees may come in at 7:00 a.m. and others at 9:00 a.m., but all regularly work no more than an eight-hour day. Flexible scheduling does not eliminate the legal requirement of paying daily overtime for all work in excess of eight hours in each workday. Unlike the alternative workweek schedules discussed in this chapter, you can institute flexible scheduling at any time. Employees cannot change their own schedules for flexibility without your approval.

Creating an Alternative Workweek Schedule

Creating an alternative workweek schedule requires careful planning and excellent record keeping. The following step-by-step guide shows you how to create an alternative workweek schedule under California law.[3] To learn about special rules that apply only to the health care industry, see "Alternative Workweek Schedules and Health Care" on page 374.

Employers will have to hold a secret ballot election to vote on the workweek. A proposal to adopt an alternative workweek schedule needs approval of at least two-thirds of affected employees in a readily identifiable work unit.[4] Refer to the *Alternative Workweek Policy Checklist* to help guide you through creating and implementing a policy.

Alternative Workweek Policy Checklist

Determine the Affected Work Unit

Alternative workweek schedules are not meant for a handful of employees within a department who want flexibility. With limited exceptions, nonexempt employees in the work unit must work the alternative workweek schedule.

The first step in adopting an alternative workweek is to define the work unit, which may include one or more nonexempt employees in:[5]

- Division
- Department
- Job classification
- Shift
- Separate physical location
- Recognized subdivision of any work unit

A work unit may consist of an individual employee if he/she is the only person in the division, department, job classification, shift, separate physical location or recognized subdivision of any work unit.

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[3] IWC Wage Orders sec. 3

[4] Lab. Code sec. 511

[5] Lab. Code sec. 511

In Wage Order 16 (Certain On-Site Occupations in the Construction, Drilling, Logging and Mining Industries) the term "work unit" only includes "all nonexempt employees of a single employer within a given craft who share a common worksite." The employees must not only share a craft, but also a worksite. Thus, all carpenters employed by a single employer may not be eligible to vote on an alternative workweek arrangement. Wage Order 16 also states that "[a] work unit may consist of an individual employee if the criteria for an identifiable work unit in this subsection is met."

Under Wage Order 16, if an eligible employee has been employed in the affected work unit within 30 calendar days preceding an election, but is not on the worksite on the election day, you must notify the employee and allow him/her to vote in any election for an alternative workweek.[6]

Propose an Alternative Schedule

You must present a written proposal for an alternative workweek schedule to employees in the affected work unit. Employees cannot create an alternative workweek without your proposal or approval.

The proposed agreement must designate a regularly scheduled alternative workweek in which the specified number of workdays and work hours regularly repeat. You need not specify the actual days worked within that alternative workweek schedule.

The schedule must provide no fewer than two consecutive days off within each workweek, except for employees working an alternative workweek in Wage Order 4, Professional, Technical, Clerical, Mechanical and Similar Occupations; Wage Order 5, Public Housekeeping Industry; Wage Order 9, Transportation Industry; Wage Order 10, Amusement and Recreation Industry; Wage Order 15, Household Occupation; and Wage Order 16, Certain On-Site Occupations in the Construction, Drilling, Logging and Mining Industries.[7]

Propose a Single Schedule or a Menu

You can propose a single work schedule that would become the standard schedule for all employees in the work unit. You can also propose a menu of work schedule options from which each employee in the work unit could choose.

Section 3(C)(1) of the Wage Orders allows you to propose a menu of options that will suit your business needs if the proposal clearly provides a specified number of regularly recurring work days and the number of hours in the work shift. The Wage Orders do not require a proposal to designate the starting and ending time of the shifts that will be available during the alternative workweek. For an example of an alternative workweek schedule, see the *Alternative Workweek Sample Calendar.*

Alternative Workweek Sample Calendar

The following are examples of acceptable regularly scheduled alternative workweeks:

- A workweek in which employees work three 12-hour shifts and one-four hour shift — also known as 3/12 and 1/4 workweek.
- A workweek in which employees work four 10-hour shifts, also known as a 4/10 workweek.[8]
- A workweek beginning at noon Friday and ending at noon the following Friday. Employees will work four nine-hour shifts and one four-hour shift each workweek.

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[6] DLSE *Enforcement Policies and Procedures Manual* sec. 56.8.5

[7] DLSE *Enforcement Policies and Procedure* [illegible]

[8] DLSE *Enforcement Policies and* [illegible]

Labor Code section 511 allows employers to include in the proposed menus of work options a regular schedule of eight-hour days that are compensated outside the scope of the alternative week. Further, with your consent, employees who adopt a menu of work schedule options can move from one schedule option to another on a weekly basis.

The DLSE recommends that employers allow employees to freely choose the shift they will work; advise employees of the fact that each shift is limited as to the number who may choose that shift and inform employees of the "nondiscriminatory" method to be utilized in assigning the employees to a particular shift.[9]

The Division of Labor Standards Enforcement (DLSE) issued an Opinion Letter[10] that states that employers can adopt an alternative workweek that rotates between two different schedules. In the employer's case, the request was for four nine-hour days and one four-hour day during the summer months and five eight-hour days the rest of the year. In the DLSE's opinion, the Labor Code does not prohibit such a schedule, if the schedule is for full workweeks during the designated months — June through September in this instance. The approval of this workweek is based on the specific schedule provided by this employer, with emphasis on the requirement that the alternate workweek begin and end during full workweeks.

Before implementing an alternative workweek schedule, employers are advised to consult with legal counsel.

The 9/80 Schedule

Subject to the limitations discussed in this section, you can implement a 9/80 schedule, also referred to as the 5-4/9 flexible schedule. The 9/80 schedule usually translates into a total of nine days of work in an 80-hour period — five days one calendar week and four days the following calendar week. Eight of the shifts are nine hours and one shift is eight hours. Employees on this schedule receive one extra day off per 80-hour pay period.

Traditionally, workdays extend from midnight to midnight, and workweeks extend from midnight on a certain workday until midnight seven days later. The 9/80 schedule requires employers to define nontraditional workdays and workweeks. Under the 9/80 schedule, you must begin the workweek for day shift employees between the fourth and fifth hours of work on any day of the week. This means the employee would work some hours of the shift on one workday and the remaining hours of that shift on the next workday. In addition, you would define the workweek so that employees will not be required to work more than 40 hours in that workweek.

By predesignating the workday to run from noon to noon, and by predesignating the workweek to run from Friday noon to next Friday at noon, the employer can establish a 9/80 schedule that does not exceed 40 hours in a workweek. The eight hours worked every other Friday are split in half, with the four hours worked before noon falling into the first workweek, and the four Friday hours worked after noon falling into the second workweek.

Of course, as with any other alternative workweek schedule under Labor Code section 511, the 9/80 schedule cannot be unilaterally imposed by the employer. The alternative workweek schedule must be (or have been) adopted by the requisite two-thirds vote in a secret ballot election to allow for this schedule without the payment of daily overtime.

This section contains examples of how the 9/80 system functions. In both examples, the workweek and workday begin at noon on Friday and end at noon on the following Friday. The workday begins at noon on any given day and continues until noon the following day. This 9/80 alternative workweek schedule is consistent and repeatable over every two-week period.

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[9] DLSE *Enforcement Policies and Procedures Manual* sec. 56.7.2.3.1

[10] DLSE Opinion Letter 2009.03.23

In the second example, employees could work nine hours each day, except on alternate Thursdays when employees work eight hours and on alternate Fridays when employees do not work. This allows some of the Friday hours to be worked in one workweek and some in the next workweek.

Example 1:

	Fri	**Sat**	**Sun**	**Mon**	**Tues**	**Wed**	**Thurs**	**Fri**	**Total**
Workweek 1 “---”= noon	--- 4	off --- off	off --- off	5 --- 4	5 --- 4	5 --- 4	5 --- 4	off ---	40 hrs
Workweek 2 “---”= noon	--- off	off --- off	off --- off	5 --- 4	5 --- 4	5 --- 4	5 --- 4	4 ---	40 hrs
Workweek 3 “---”= noon	--- 4	off --- off	off --- off	5 --- 4	5 --- 4	5 --- 4	5 --- 4	off ---	40 hrs
Workweek 4 “---”= noon	--- off	off --- off	off --- off	5 --- 4	5 --- 4	5 --- 4	5 --- 4	4 ---	40 hrs

Example 2:

	Fri	**Sat**	**Sun**	**Mon**	**Tues**	**Wed**	**Thurs**	**Fri**	**Total**
Workweek 1 “---”= noon	--- 5	off --- off	off --- off	4 --- 5	4 --- 5	4 --- 5	4 --- 4	off ---	40 hrs
Workweek 2 “---”= noon	--- off	off --- off	off --- off	4 --- 5	4 --- 5	4 --- 5	4 --- 5	4 ---	40 hrs
Workweek 3 “---”= noon	--- 5	off --- off	off --- off	4 --- 5	4 --- 5	4 --- 5	4 --- 4	off ---	40 hrs
Workweek 4 “---”= noon	--- off	off --- off	off --- off	4 --- 5	4 --- 5	4 --- 5	4 --- 5	4 ---	40 hrs

Determine the Maximum and Minimum Hours Allowable

You can create an alternative workweek schedule in any combination of hours. You must pay the overtime premium for all hours over 10 in one workday and over 40 in one workweek.[11] For more information, see “Basic Overtime Obligation During an Alternative Workweek” on page 370.

Under most Wage Orders, the alternative workweek schedule must be a minimum of four hours. However, Wage Order 16 (Certain On-Site Occupations in the Construction, Drilling, Logging and Mining Industries) does not contain a minimum number of hours.

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[11] *Mitchell v. Yoplait,* 122 Cal. App. 4th (2004)

Distribute a Written Disclosure

When proposing an alternative workweek schedule, you must provide a written disclosure of the proposed schedule's effects on the employees' wages, hours and benefits. Failure to comply with this requirement invalidates the alternative workweek schedule election.

If at least five percent of the affected employees speak a language other than English, you must provide the written disclosure in English and the other language.

You must mail a copy of the written disclosure to employees who did not attend the meeting to discuss the alternative workweek.

Hold at Least One Meeting

You must hold a meeting at least 14 days prior to voting for the specific purpose of discussing the alternative workweek schedule's effects. Give employees advance notice of the meeting date and time. You may need to hold more than one meeting if it is not practical or possible for all affected employees to attend at the same time.

Do Not Coerce Employee Support

You can express your opinion about the alternative workweek to the affected employees. However, you cannot intimidate or coerce employees to vote either in favor of or against a proposed alternative workweek. You cannot terminate or discriminate against employees for expressing opinions about the alternative workweek election. You cannot terminate or discriminate against employees for opposing or supporting its adoption or repeal.

Hold a Secret Ballot Election

All affected employees in the work unit are entitled to a vote to approve or reject the proposed schedule in a secret ballot election. A two-thirds vote is required for the schedule to become effective. Do not require employees to put their names or other identifying information on their ballots. Both the statute and the Wage Orders clearly require that two-thirds of all affected employees must vote in favor of adopting the alternative workweek schedule, not just two-thirds of the employees who actually voted. In effect, an employee who doesn't vote, votes no.[12]

You must hold the election during regular working hours at the affected employees' worksite. You must pay all the costs. The vote must take place before the employees begin working the alternative workweek schedule. A retroactive vote is not effective.

Only those employees affected by the alternative workweek schedule can vote. Exempt employees in the unit do not vote.

Upon receiving a complaint by an affected employee, the Labor Commissioner must investigate. The Labor Commissioner may require you to select a neutral third party to conduct the election.

Employees affected by a change in the work hours resulting from the adoption of an alternative workweek schedule may not be **required** to work those new hours for at least 30 days after the announcement of the final results of the election.[13]

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[12] DLSE *Enforcement Policies and Procedu* [illegible]

[13] IWC Wage Orders sec. 3(c)(7)

Alternative Workweeks and Wage Order 16

Under Wage Order 16, Certain On-Site Occupations in the Construction, Drilling, Logging and Mining Industries, the DLSE requires employers to take certain steps to notify employees of the alternative workweek schedule election. At least 14 days prior to the election, you must notify all employees who are eligible to vote of the election date, time and place. Employees are eligible to vote if they have been employed on the worksite within 30 calendar days immediately preceding the election. You must act in good faith and send the notice to each eligible employee's last known address. You must include a ballot that the employees must bring to the election.

You bear the burden of proof that you used good-faith efforts to notify employees and deliver ballots. Failure to show that you used good-faith efforts to inform all eligible employees will void the election.[14]

The Wage Orders provide that "[t]he election shall be held during regular working hours at the employees' worksite." Some employees of a single employer who work in the on-site occupations covered by Wage Order 16 may be eligible to vote on one worksite while currently assigned to another worksite. The DLSE requires that each employee who is eligible to vote must have the opportunity to vote without loss of pay. If necessary, you must provide any current employee transportation to the worksite where the election is held. You must also pay for the time that the employee reasonably lost in voting during working hours.[15]

Department of Industrial Relations (DIR)

File the election results with the Office of Policy, Research and Legislation (OPRL) within 30 days of the final election. After you file the results, they become a public document.

Do not send the actual ballots. Send election results to:

Office of Policy, Research and Legislation
Attention: Alternative Workweek Election Results
Department of Industrial Relations
P. O. Box 420603
San Francisco, CA 94142-0603

Use a memo format and include the following information:

- Organization name, phone number, address and contact person
- Election date
- Statement of passage or failure of the election
- Election results
  - *If more than one person voted*: a statement that the vote was a written, secret ballot and that it passed by at least two-thirds of the vote (for example, "... 50 out of 60 voting employees voted in favor of the alternative workweek schedule ...")
  - *If only one person voted*: a statement that the vote was a written ballot and that the one person voting voted in favor of the alternative workweek schedule
- Description of the actual alternative workweek schedule that is the subject of the election

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[14] DLSE *Enforcement Policies and Procedures Manual* sec. 56.8.5.4

[15] DLSE *Enforcement Policies and Procedures Manual* sec. 56.9

Retain Complete Records

Keep complete records of the alternative workweek election, as well as documentation showing how the schedule is being followed, including:

- The proposal submitted to employees
- The written disclosure distributed to employees
- Minutes from the meeting(s) held to discuss the proposed schedule
- Records of the election procedure
- Election results
- A copy of the memo about the election results submitted to DIR
- Documentation indicating that the results were properly filed with DIR
- Any documentation about employees who are unable to work the alternative workweek schedule and who are being accommodated with a different schedule
- Actual alternative workweek schedules or calendars
- Documentation of occasional changes to the schedule and notice given to employees about these changes
- Overtime records
- Meal period waivers
- Requests by employees to substitute their regularly scheduled working days
- Makeup time requests
- Petitions to repeal the alternative workweek schedule

Employers should consider including an alternative workweek policy to their employee handbooks.

Alternative Workweek Schedules Before 1999

Under Wage Order 1, Manufacturing Industry; Wage Order 4, Professional, Technical, Clerical, Mechanical and Similar Occupations; Wage Order 5, Public Housekeeping Industry; Wage Order 7, Mercantile Industry; and Wage Order 9, Transportation Industry, a limited provision exists for employees who were voluntarily working alternative workweek schedules before July 1, 1999. You can continue an alternative workweek schedule if it meets all of the following criteria:

- It was an individual agreement made between the employee and employer after January 1, 1998
- It provides for a workday of not more than 10 hours
- On or before May 30, 2000, the employee submitted a written request to continue the schedule, which you approved

An employee can revoke this voluntary authorization to continue the schedule with 30 days written notice to you.

Maintaining the Alternative Workweek Schedule

To properly maintain the alternative workweek schedule after the approval vote, you must comply with the requirements discussed in this section.

Create the Alternative Workweek Schedule

Before employees vote, you need not specify the actual days worked within the alternative workweek schedule. After the vote, you will need to set the actual schedule. Before employees begin to work the schedule, you must schedule the actual workdays and the starting and ending times of the shifts.

Occasional changes to the schedule are acceptable if you provide employees with reasonable notice. The DLSE considers one-week notice to be reasonable notice.[16]

You cannot create a system of on-call employment, in which the days and hours of work are subject to continual changes, depriving employees of a predictable work schedule.

Accommodate Employees Who Cannot or Will Not Work the Alternative Workweek Schedule

The regulations do not define what it means to be unable to work an alternative workweek schedule. It seems fairly certain that an employee would be unable to work the long hours of an alternative workweek schedule if he/she has a medical restriction. However, a situation in which an employee's child day care situation or college schedule makes it difficult for him/her to work longer hours may not qualify as being unable to work.

You have three different obligations to accommodate employees who are unable to work an alternative workweek schedule.[17]

- **You must accommodate an employee's religion.** You must explore any available reasonable alternative means to accommodate an affected employee's religious belief or observance that conflicts with an alternative workweek schedule. For more information on your general obligation to reasonably accommodate an employee's religious beliefs, see "Religion" in Chapter 26, page 734.
- **You must accommodate employees who were eligible to vote in the election.** You must make a reasonable effort to find a work schedule of no more than eight hours in a workday to accommodate any affected employee who was eligible to vote in the election and who is unable to work the alternative workweek schedule. If the employee was eligible to vote, you must make a reasonable effort to accommodate the employee regardless of whether that employee actually voted in the election.
- **You must accommodate employees hired after the election.** You are permitted to provide a work schedule of no more than eight hours in a workday to accommodate any employee hired after the election who is unable to work the alternative schedule established by that election. This is the employer's choice; choosing not to accommodate will not invalidate the schedule.

Ensure Meal and Rest Breaks During an Alternative Workweek Schedule

Employees on alternative workweek schedules are generally entitled to the same meal and rest breaks as employees on traditional schedules. An employee who works more than 10 hours in a shift is normally entitled to two 30-minute meal breaks. An employee can waive the second meal break with your consent if he/she did not waive the first meal break and 12 hours will complete the day's work. For more information, see "Meal and Rest Breaks" in Chapter 12, page 316.

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[16] DLSE *Enforcement Policies and Procedures Manual* sec. 56.23.2

[17] Lab. Code sec. 511(d)

Ensure One Day's Rest in Seven in an Alternative Workweek

Generally, every employee is entitled to at least one day off in a seven-day workweek.[18] However, an employee can accumulate rest days when the nature of employment reasonably requires that he/she work seven or more consecutive days. An employee must receive days of rest equivalent to one day's rest in seven during each calendar month.

The requirement for one day off in seven does not apply to emergencies, agricultural work, work performed in the protection of life or property from loss or destruction or when hours worked do not exceed 30 in any workweek or six in any workday.[19]

Paid Sick Leave and Alternative Workweek Schedules

California's Healthy Families, Healthy Workplaces Act mandates a certain amount of paid sick leave for California employees. The state Labor Commissioner has provided guidance for how an employer provides paid sick leave when alternative workweeks are involved. For more information, see "Non-Traditional Work Schedules and Providing '24 Hours or Three Days'" in Chapter 20, page 541.

Paying Overtime in an Alternative Workweek

You can require employees on an alternative workweek schedule to work overtime. This section discusses your overtime obligations for employees on an alternative workweek schedule. For more information on overtime, see Chapter 13, "Overtime."

Basic Overtime Obligation During an Alternative Workweek

On an alternative workweek schedule, you must provide time and one-half the employee's regular rate of pay for:

- All work performed in any workday in excess of the regularly scheduled hours established by the alternative workweek agreement, up to 12 hours a day
- All work performed beyond 40 hours per week

On an alternative workweek schedule, you must pay double the employee's regular rate of pay for:

- All work performed in excess of 12 hours per day
- Any work in excess of eight hours on days other than those regularly scheduled by the alternative workweek agreement

There are exceptions to these requirements for makeup time and for occasions when you approve an employee's request for a substitution of workdays. For more information, see "Using Makeup Time" in Chapter 13, page 353. There are also exceptions in the health care industry. For more information, see "Alternative Workweek Schedules and Health Care" on page 374.

The alternative workweek arrangements adopted pursuant to Wage Orders 1-3, 6-13 and 16 (and all employees subject to Orders 4-2001 or 5-2001 except those employed in the Health Care Industry) must provide that all work in excess of the schedule established by the agreement and up to 12 hours per day or beyond 40 hours per week shall be paid at 1.5 times the employee's regular rate of pay. All work performed in excess of 12 hours per day and any work in excess of eight hours on those days worked beyond the regularly scheduled number of workdays established by the alternative workweek shall be paid at double the employee's regular rate of pay.

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[18] Lab. Code secs. 551, 552

[19] Lab. Code secs. 554, 556

Exception: Substituting Workdays in an Alternative Workweek

Typically, any work that an employee performs outside of his/her regular schedule is paid at an overtime rate. However, you can substitute one day of work for another day to meet the employee's personal needs, without paying overtime for the otherwise unscheduled day.

These substitutions must be on an occasional basis and at the employee's request. Also, the shift must be the same length.

Example: An employee on an alternative workweek is scheduled for four 10-hour shifts each week, Monday through Thursday. The employee asks to take Monday off and work Friday instead. If you approve the request, there would be no overtime obligation on Friday if the employee worked 10 hours.

Pyramiding Overtime in an Alternative Workweek

Only hours worked at straight-time apply to the weekly 40-hour limit for overtime. This prevents pyramiding of overtime. Pyramiding is defined as being paid more for the same hours worked. After an employee has been paid daily overtime for working more hours than those scheduled in the alternative workweek agreement, those overtime hours do not count toward the weekly 40-hour limit. For more information, see "Overtime Examples" in Chapter 13, page 349.

Regularly Scheduled Overtime in an Alternative Workweek

You can require employees to work beyond the number of hours established by the alternative workweek agreement. The employees can work overtime hours on a recurring basis if you pay the appropriate overtime compensation.[20]

Overtime Due for Shortened Shift

If you require an employee to work less than the agreed upon hours in a shift, the employee is entitled to time and one-half for hours in excess of eight and double-time for hours in excess of 12 on that day. This is true only if you require the employee to work fewer hours than scheduled. If the employee asks to leave early, this penalty does not apply.

Example: An employee scheduled for a 10-hour shift is sent home after 9.5 hours because of a mechanical breakdown. The employee is entitled to eight hours at straight-time and 1.5 hours at time and one-half for that day.

Examples of Overtime in an Alternative Workweek

The following examples show overtime situations involving employees working on an alternative workweek schedule. The employee in each example earns $10 per hour.

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[20] IWC Statement as to the Basis for Wage Orders 1-2001 to 15-2001 sec. 3

Overtime Example 1: 4/10 Workweek

The employee is scheduled to work four 10-hour days, Monday through Thursday. On Monday, the employee earns two hours overtime at time and one-half. On Wednesday, the employee works four hours overtime. She is paid time and one-half for the first two hours and double-time for the last two hours. She is paid time and one-half for the first eight hours worked on Friday and two hours at double-time, because she must be paid the double-time rate for work hours in excess of eight on the unscheduled fifth day in the 4/10 workweek.

	Mon	Tues	Wed	Thur	Fri	Sat	Sun	Hours Paid	Wage Rate	Wages Paid
Total Hours Worked	12	10	14	10	10	0	0	56		
Straight-time (x 1.0)	10	10	10	10	0	0	0	40	$10	$400
Overtime (x 1.5)	2	0	2	0	8	0	0	12	$15	$180
Double-time (x 2.0)	0	0	2	0	2	0	0	4	$20	$80
Wages Paid for Workweek										$660

Overtime Example 2: 4/10 Schedule with Makeup Time

The employee is scheduled to work four 10-hour workdays, Wednesday through Saturday. However, the employee requests in writing two hours off to attend his son's birthday party on Saturday. Following the employer's makeup time policy, he makes up the two hours lost on Sunday. Because he followed the makeup time policy, he is not owed overtime for the week. If he worked the two hours outside the regularly scheduled workweek without following the makeup time requirements, he would have been owed 38 hours at straight-time and two hours at time and one-half.

	Mon	Tues	Wed	Thur	Fri	Sat	Sun	Hours Paid	Wage Rate	Wages Paid
Total Hours Worked	0	0	10	10	10	8	2	40		
Straight-time (x 1.0)	0	0	10	10	10	8	2	40	$10	$400
Overtime (x 1.5)	0	0	0	0	0	0	0	0	$15	0
Double-time (x 2.0)	0	0	0	0	0	0	0	0	$20	0
Wages Paid for Workweek										$400

Repealing the Alternative Workweek Schedule

You can terminate an alternative workweek schedule unilaterally without holding a repeal election, but only after providing reasonable advance notice to your employees.[21] Employees can repeal an alternative workweek schedule by holding another secret ballot vote, using the following procedure:

- Employees must petition to repeal the schedule. One-third of the affected employees must sign the petition to require you to conduct a repeal vote.
- You must hold a new secret ballot election to decide whether to repeal the schedule. A two-thirds vote of the affected employees is required to reverse the alternative workweek schedule. The election must take place during regular working hours at the employees' worksite.

Hold the election to repeal the alternative workweek schedule not more than 30 days after the petition is submitted to you. You must hold the election not less than 12 months after the date that the same group of employees voted in an election held to adopt or repeal an alternative workweek schedule.[22] Under Wage Order 16, Certain On-Site Occupations in the Construction, Drilling, Logging and Mining Industries, you must hold the election not less than six months after the date that the same group of employees voted in an election held to adopt or repeal an alternative workweek schedule.

You cannot be forced to hold an election to repeal the schedule if less than 12 months have elapsed since that same group of employees:

- Voted to adopt the alternative workweek schedule
- Held an election to repeal an alternative workweek schedule

Exception: For alternative workweek schedules adopted under Wage Order 4, Professional, Technical, Clerical, Mechanical and Similar Occupations and Wage Order 5, Public Housekeeping Industry, between October 1, 1999 and October 1, 2000, a new secret ballot election to repeal that alternative workweek schedule is not covered by the limitation of 12-month intervals between elections.

If the alternative workweek schedule is revoked, you must comply within 60 days. The Labor Commissioner can grant an extension if you can show that revoking the schedule within 60 days would cause undue hardship on normal business operations.

You cannot reduce an employee's regular rate of hourly pay as a result of the adoption, repeal or nullification of an alternative workweek schedule.

Invalidating Alternative Workweeks

The Labor Commissioner invalidates alternative workweeks for many reasons. Some of the most common include:

- The alternative workweek schedule was improperly implemented:
  - A secret ballot election was not conducted.
  - Too many hours are scheduled per day.
  - The schedule was not reported to DIR.
  - Not all employees in the work unit are on alternative workweek schedules.

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[21] DLSE Memorandum of December 23, 1999, "Understanding AB 60: An In Depth Look at the Provisions of the 'Eight Hour Day Restoration and Workplace Flexibility Act of 1999,'" written by chief counsel for the California Labor Commissioner

[22] IWC Wage Orders sec. 3(C)(5)

- You did not pay overtime properly for the alternative workweek schedule.
- The people on the alternative workweek schedule no longer belonged in the original work unit.
- Employees consistently work outside the regular schedule.
- The alternative workweek schedule was changed without the required procedures. For example, you ask employees on a 4/10 schedule to work a 4/9 schedule during off-peak months.
- A collective bargaining agreement containing an alternative workweek schedule expired.

Exceptions to the Alternative Workweek

There are certain exceptions or variations to the alternative workweek scheduling provisions.

The alternative workweek scheduling provisions of the law do not cover employees on public works projects and agriculture. However, Wage Order 14, Agricultural Occupations, permits agricultural employees to work up to 10 hours per day without overtime, in limited circumstances.

Employees working under a collective bargaining agreement fall under the agreement's terms if the agreement provides premium pay for overtime hours and at least 30 percent higher wages than the state minimum wage.

The most notable variations in the alternative workweek scheduling provisions relate to the health care industry, where significant differences were created to allow for operational and customary practices.

Alternative Workweek Schedules and Health Care

Certain employees in the health care industry can work shifts longer than 10 hours on an alternative workweek schedule. The alternative workweek schedule regulations for these employees differ in other ways as well. This section explains which employees fall under the exceptions. It also explains pertinent regulations.

Health Care Employer and Employee Defined

The term "health care industry" is defined as any of the following:

- Hospitals
- Skilled nursing facilities
- Intermediate care and residential care facilities
- Convalescent care institutions
- Home health agencies
- Clinics operating 24 hours per day
- Clinics performing surgery, urgent care, radiology, anesthesiology, pathology, neurology or dialysis

Some employees in the health care industry fall under the alternative workweek schedule exceptions. These are employees who:

- Provide patient care or care to residents in a residential care facility

- Work in a clinical or medical department, including pharmacists dispensing prescriptions in any practice setting
- Work primarily or regularly as a member of a patient care delivery team
- Work as licensed veterinarians, registered veterinary technicians and unregistered animal health technicians providing patient care

Some employees are not considered health care employees. Therefore, they are not covered by the health care employee exemptions. These are employees who are primarily engaged in the following duties or combination of duties:

- Providing meals
- Performing maintenance or cleaning services
- Performing business office or other clerical functions

12-Hour Shifts Permissible in the Health Care Industry

Employees in the health care industry (under Wage Orders 4 and 5) can vote to implement a regularly scheduled alternative workweek schedule that includes workdays of up to 12 hours within a 40-hour workweek. When implemented, such an agreement means no overtime is required for those hours worked.

Employees in the health care industry on alternative workweek schedules must be paid overtime at the following rates:

- Double the employee's regular rate of pay for all hours worked in excess of 12 in a workday
- 1.5 times the employee's regular rate of pay for all hours worked in excess of 40 in a workweek

These overtime obligations also apply to employees temporarily assigned to a health care employer's alternative workweek schedule.

In *Singh v. Superior Court*, a California appeals court confirmed that health care employees on a 3/12 schedule need not be paid time and one-half for the 37th through 40th hour in the regularly scheduled workweek.[23]

Employees working under other Wage Orders that contain alternative workweek provisions can work up to 12-hour shifts. However, the employees must be paid overtime for any hours worked in excess of 10 in one workday.[24]

Minimum Shift Length in the Health Care Industry

An alternative workweek schedule in the health care industry cannot provide fewer than four hours of work in any shift.

Health Care Emergency

You can require an employee assigned to a 12-hour shift to work more hours in narrowly defined health care emergencies. A "health care emergency" consists of an unpredictable or unavoidable occurrence at unscheduled intervals relating to health care delivery, requiring immediate action.[25]

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[23] *Singh v. Superior Court*, 140 Cal. App. 4th 387 (2006).

[24] *Mitchell v. Yoplait*, 122 Cal. App. 4th (2004).

[25] DLSE *Enforcement Policies and Procedures Manual* sec. 56.[illegible]

Only the Chief Nursing Officer or authorized executive of the hospital staff can declare a health care emergency.[26] There must be an objective showing that all of the following criteria are met:

- A health care emergency exists.
- All reasonable steps have been taken to provide required staffing.
- Considering overall operational status needs, continued overtime is necessary to provide required staffing as defined at Section 2(I) of Wage Order 4-2001 and Wage Order 5-2001.

Even in a health care emergency, an employee can work no more than 16 hours unless there is a voluntary mutual agreement between you and the employee.

Relief for Employee No-Show in the Health Care Industry

An employee scheduled for a 12-hour shift can work up to 13 hours if the employee scheduled for the next shift does not report for duty and does not inform you more than two hours in advance that he/she will not be reporting.

Meal Break Waiver in the Health Care Industry

Employees in the health care industry who work shifts in excess of eight hours total in a workday can voluntarily waive their right to one of their two meal breaks. To be valid, the waiver must be in writing and you and your employee must sign it. The employee can revoke the waiver at any time by providing you with at least one day's written notice. While the waiver is in effect, you must fully compensate the employee for all working time, including an on duty meal period.

Health Care Employees Unable to Work the Alternative Schedule

You must make a reasonable effort to find another work assignment for any employee who meets all of the following criteria:

- Is covered by Wage Order 4, Professional, Technical, Clerical, Mechanical and Similar Occupations, or Wage Order 5, Public Housekeeping Industry
- Participated in a valid election prior to 1998
- Is unable to work the alternative workweek schedule. If you are engaged in the operation of a licensed hospital that institutes a valid 3/12 schedule (three 12-hour workdays) or if you provide personnel for such an operation, you must make a reasonable effort to find another work assignment for any employee who participated in the vote and is unable to work the 12-hour shifts. You are not required to offer a different work assignment to an employee if such a work assignment is not available or if the employee was hired after the 3/12 alternative workweek schedule was adopted.

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[26] IWC Wage Orders 4-2001, 5-2001 sec. 3(B)(9)

State Disability Insurance (SDI) and Paid Family Leave (PFL)

California's Employment Development Department (EDD) administers the State Disability Insurance (SDI) and Paid Family Leave (PFL) programs to help employees temporarily unable to work for personal reasons. Employers do not fund either the SDI or PFL. The programs receive funding through employee payroll deductions.

SDI/PFL Comparison

The following table provides a broad overview of how SDI and PFL overlap.

SDI or PFL Issue	**Requirement**
Covered employers	With few exceptions, all employers are covered by SDI and PFL, although the tax is paid by employees. Most employees pay into the SDI and PFL funds.
Maximum benefit amount	The SDI benefit maximum is 52 times the weekly benefit amount or the total wages earned in the base period, whichever is less. PFL benefits are approximately 55 percent of the employee's earnings. The maximum time during which PFL benefits can be paid is six weeks in a 12-month period.
Employee eligibility	SDI benefits are payable to employees who are disabled by a non-work-related illness or injury, including pregnancy, that prevents them from performing their customary work. There is a seven-day waiting period before benefits begin. PFL benefits are payable to employees who must care for a family member. There is a seven-day waiting period before benefits begin.
Interaction with other leaves, payments and benefits	SDI benefits can be paid during PDL, FMLA, CFRA and disability leaves and in combination with paid vacation, PTO and sick pay. PFL benefits can be paid during FMLA/CFRA leave in combination with paid vacation, PTO and sick pay.
Employer responsibilities	You must make deductions from payroll, file required reports with EDD, respond to EDD requests for information, post notices in the workplace and provide employees with pamphlets required by law.
Ending the employment relationship before the benefit expires	SDI and PFL do not protect employees from termination. However, when the individual is protected by a leave law, do not take action to terminate the individual before consulting legal counsel.

State Disability Insurance Defined

The SDI program is a state-mandated, partial wage replacement insurance plan for California employees. SDI provides short-term, financial benefits to eligible employees who suffer a loss of wages when unable to work due to a non-work-related illness or injury or when medically disabled due to pregnancy or childbirth. SDI is not a leave of absence.

Mandatory Leave Laws and SDI

Issue	**FMLA, CFRA, PDL leaves of absence (state and federal law)**	**SDI wage replacement during a leave of absence (state law)**
Employer coverage	FMLA & CFRA — 50 or more employees at a worksite PDL — five or more employees	One or more employees
Employee eligibility	FMLA & CFRA — Has worked for you for 12 months and 1,250 hours in the prior 12-month period, and works at a worksite with at least 50 employees within 75 miles of the worksite PDL — Immediate for a period of actual disability	Immediately upon employment and need for leave if employee has earned at least $300.00 from which SDI deductions were withheld Requires seven-day waiting period
Duration	FMLA & CFRA — 12 weeks in a 12-month period (leave is typically unpaid) or 26 weeks for service member leave PDL — Periods of actual disability, up to four months	Up to a maximum of 52 weeks
Reasons for leave	FMLA & CFRA — For the employee's own serious health condition; to care for a seriously ill child, parent or spouse; for baby bonding (bonding with a newborn child or a child placed with the employee in connection with adoption or foster care) For servicemember care leave or a qualifying exigency related to military service by a family member PDL — Disability due to pregnancy or pregnancy-related conditions	For employee's own non-work-related disability that results in a loss of wages
Requirement for medical certification	Yes, you can require medical certification	The EDD determines eligibility for benefits

Issue	FMLA, CFRA, PDL leaves of absence (state and federal law)	SDI wage replacement during a leave of absence (state law)
Sick, vacation or PTO pay during leave	You can require the employee to use accrued benefits such as sick, vacation or PTO while on FMLA/CFRA leave if leave is unpaid. However, if the employee is receiving pay under a disability benefits plan (such as SDI or PFL), they cannot be required to use those benefits. You can require the employee to use sick pay while on PDL if the leave is unpaid but you cannot require the use of vacation or other accrued PTO during PDL	You can allow the employee to use accrued sick, vacation or PTO to supplement SDI benefits while the employee is on leave for FMLA/CFRA/PDL
Reinstatement rights	You must reinstate the employee to the job held prior to the need for leave	Creates no reinstatement rights. The right may exist under some other law or organization policy
Continuation of benefits	The employee is entitled to the same level of benefits as if he/she were still on the payroll. The employee pays any contribution they would pay if they were at work	No benefit continuation unless it exists under some other law
Relationship to current leave laws (employee's own serious illness or injury)	FMLA and CFRA run concurrently unless the employee is disabled by pregnancy. PDL runs concurrently with FMLA, and the employee will be entitled to CFRA after she is no longer disabled by the pregnancy	SDI benefits are available to eligible employees on FMLA/CFRA leave for their own serious illness or injury, and to employees on PDL if disabled by pregnancy

California's Disability Insurance Plans

The Disability Insurance Branch of the EDD administers three disability insurance plans:

1. **State Plan:** This plan is operated by the EDD and covers the majority of employees in California.

2. **Voluntary Plan:** This is a private plan, approved by the EDD's director, which you can substitute for the state plan. You can establish a voluntary plan if you and the majority of your employees agree to do so. See "Voluntary SDI Plans" on page 393.

3. **Elective Coverage:** Small business owners or self-employed individuals also can choose to participate in the Disability Insurance Elective Coverage (DIEC) program. This state-sponsored program provides benefits to eligible small business owners and self-employed individuals who suffer a loss of income when unable to perform their usual work due to illness or injury, whether or not the illness or injury is work- or pregnancy-related. However, the method of computing benefits for elective coverage participants is different from employees whose coverage by the state plan is mandated. You can obtain information on the annual cost for participation by contacting the EDD Taxpayer Assistance Center at (888) 745-3886.

Individuals in family employment not covered by the California Unemployment Insurance Code can also elect coverage at the same rate and with the same benefits as employees covered by the state plan.

No Obligation to Guarantee Reinstatement After SDI Leave

A common misconception is that an employee who goes out on SDI has a right to a protected leave of absence as long as he/she collects SDI. In fact, you are not obligated to hold a job because an employee collects SDI benefits.[1] Even when collecting SDI benefits, an employee has no right to a guaranteed return to his/her job unless covered by one of the mandatory leave laws, such as family leave or pregnancy leave, or is on a leave as a reasonable accommodation under disability laws.

Before terminating an employee who is off work and on SDI, determine if a federal or California law might protect the employee's leave of absence.

For more information on mandatory leave and disability discrimination laws, see:

- Chapter 18, "Family and Medical Leave"
- Chapter 19, "Pregnancy Disability Leave (PDL)"
- Chapter 28, "Disabilities in the Workplace"

Employees Not Covered by SDI

The EDD excludes certain employees from SDI coverage. These employees are not required to contribute to the SDI program:

- **Individuals performing ministerial duties.** Work performed in a hospital by an ordained member of a religious organization does not constitute employment for disability insurance if the service is required by ministerial duties in practicing the religion. This is true only if the religious work is controlled by and subject to the discipline of a religious body's governing board.[2]
- **School district and local government personnel.** In general, the disability insurance program also excludes employees of school districts and local governments.[3]
- **State employees.** Employees of state-funded institutions of higher education and other governmental entities are also generally exempt.[4]
- **Individuals who rely on prayer for healing.** Individuals who file religious exemption certificates with the EDD and their employers declaring that they rely on prayer in the practice of religion for healing are exempt from SDI coverage.[5]
- **Individuals performing domestic service.** Individuals performing domestic service, including in-home supportive services, are excluded from disability insurance coverage if their employing unit paid wages in cash of less than $750 to the individual during any calendar quarter in the preceding calendar year.[6]

Voluntary Refusal of Disability Insurance

An individual who is a sole stockholder of a private corporation organized for profit and who is included within the meaning of the term "employee" can refuse his/her rights to disability insurance benefits. This exempts the corporation from making the required contributions. The individual must submit *Form DE 459 - Sole Shareholder/Corporate Officer Exclusion Statement* to the EDD before the exemption takes effect.

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[1] UI Code sec. 2601

[2] UI Code sec. [illegible]

[3] UI Code sec. [illegible]

[4] [illegible]

[5] [illegible]

[6] UI Code secs. 684, 2606.5

Employment Covered by SDI

SDI covers most employees and most types of employment. For disability purposes, "employment" generally has the same meaning as that used in unemployment insurance (UI).[7] For more information, see Chapter 16, "Unemployment Insurance." It also covers services in connection with operating a hospital by an organization except federal, state and county hospitals. Local health district hospitals are covered.[8]

Employer SDI Obligations

Though the state administers SDI benefit payments, you do bear several obligations:

- Informing employees of their right to benefits
- Making proper payroll deductions
- Sending the money deducted to the state
- Filing quarterly and year-end reports to the state

Providing Required SDI Forms

If you are covered by the state disability and UI programs, you must post and maintain the EDD's *Form DE 1857A - Notice to Employees - Unemployment Insurance, State Disability Insurance and Paid Family Leave* in places readily accessible to employees to inform employees of their rights to UI and disability insurance.[9] If you are covered only by disability insurance, you must post the *Form DE 1858 - Notice to Employees Disability Insurance, Paid Family Leave.*

You also must provide the EDD pamphlet *DE 2515 - State Disability Insurance Provisions*, which summarizes the state disability program to:

- Each new employee at the time of hire
- Each employee who becomes disabled due to pregnancy or who becomes ill, injured or hospitalized due to causes unrelated to work[10]

Employees who are placed on a leave of absence must be given a *DE 2320 - For Your Benefit, California's Programs for the Unemployed* pamphlet.[11]

Failure to comply with these requirements constitutes a misdemeanor.[12]

You can download disability insurance forms and publications from the EDD's website at www.edd.ca.gov/Disability/Forms_and_Publications.htm.

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[7] UI C [illegible]

[8] UI Code sec. 2606

[9] UI Code sec. 2706

[10] UI Code sec. 1089

[11] 22 CCR 1089-1(d)(1)

[12] UI Code sec. 1089

When an SDI claim is filed, you will receive a *Form DE 2503 - Notice to Employer of Disability Claim Filed*. Complete and return the form within two working days when you have information affecting the claimant's eligibility.

CalChamber's ***California and Federal Employment Notices Poster*** contains the 17 required state and federal postings, including the required EDD disability insurance poster all California employers must post. CalChamber also packages the PFL and SDI pamphlets in packets of 20 each. To order, call (800) 331-8877, or visit our online store at store.calchamber.com.

Withholding Employee's SDI Contributions

The EDD's director determines the rate each employee must contribute to the Disability Insurance Fund. The contribution rate for the following year is determined each year on or about November 30. Depending on the state of the SDI fund, the contribution rate may change from year to year. When the rate and limits are announced, the information will be available on the EDD's 24-hour automated call system at (916) 653-7795 and on the EDD's website at http://www.edd.ca.gov/payroll_taxes/rates_and_withholding.htm.

Sending Employee SDI Contributions to the EDD

The EDD requires you to withhold from employee wage payments the total amount of SDI taxes owed by employees on their gross wages. You must show deductions on payroll records, provide each employee with a statement of his/her deductions and remit the withheld sums to the EDD for deposit in the Disability Fund. Report contributions to the EDD in the same manner as unemployment taxes.

Exceptions to SDI Payments

You can avoid certain taxes and penalties for failing to make a timely return or payment if you reasonably relied on written advice from the EDD. You need not pay taxes, additions to tax and penalties when:

- You requested, in writing, advice from the EDD about whether a particular activity or transaction is covered by EDD's tax laws;
- You provided the specific facts and circumstances of the employment relationship, activity or transaction;
- The EDD responded in writing;
- You did not remit taxes due based on the EDD's written advice;
- The EDD had not modified or rescinded the advice to you; and
- There was no subsequent change in law, regulation or material fact relating to that tax.[13]

Inaccurate Employer SDI Payments

The EDD's director can charge you for amounts you are determined to owe in specified instances. If you fail to make a return and pay contributions, the EDD's director can use any information available to him/her to compute the amount owed.[14] The assessment procedure also imposes a 10 percent penalty on any unpaid amounts. If the delinquency is motivated by an intent to defraud the EDD or evade the Unemployment Insurance Code, your penalty rises to 50 percent of the amount of contributions.[15]

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[13] UI Code sec. 1233

[14] UI Code sec. 1126

[15] UI Code sec. 1128

Inaccurate Employer SDI Reporting

If your return provides inadequate or defective data, the EDD can use any information in its possession to compute the actual amount owed.[16] If a deficiency exists, the EDD's director may charge you for that amount and may impose a 10 percent penalty if it appears that negligence or intentional disregard of regulations produced the deficiency.[17] You must also pay daily interest on any unpaid contributions at the rate computed as previously indicated. This accrues from the date of delinquency.[18] If the EDD's director determines that delay may prevent collection of unpaid contributions, he/she may use a jeopardy assessment similar to that used in UI proceedings.

Special SDI Cases

In cases of seasonal or short-term businesses or those threatened with imminent insolvency, the EDD's director may act to ensure payment of disability contributions. This provides for shorter reporting and collection periods.[19] You must pay all contributions in these cases within 10 days after the reporting period set by the EDD's director. If unpaid at that time, the contributions become delinquent.

Filing SDI Appeals

1. When the EDD's director makes an assessment against you, you have 30 days from the date of receiving the notice of assessment to petition for review or reassessment with an administrative law judge. If a petition for review is not filed within the 30-day period, the assessed amount is final and due at the end of the 30 days.[20]

2. An administrative law judge (ALJ) from the California Unemployment Insurance Appeals Board initially hears the petition for reassessment.

3. A hearing is held if you request it, unless you have already had a hearing on the same issue.

4. The ALJ must give 20 days' notice of the time and place of hearing unless the parties consent to a shortened period.[21]

5. After the ALJ renders his/her decision, you and the EDD's director are immediately informed of it.

6. Either party has 30 days to appeal or the ruling becomes final.

7. The Unemployment Insurance Appeals Board may extend the appeal period upon a showing of good cause.[22]

8. When receiving an appeal, the Unemployment Insurance Appeals Board can affirm or modify the ALJ's decision.

9. If the Board orders a modification, the EDD must make appropriate adjustments.[23]

10. The decision becomes final 30 days after the EDD's director notifies you of the amount owed.

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[16] UI Code sec. 1127

[17] UI Code sec. 1127

[18] UI Code sec. 1129

[19] UI Code sec. 1115

[20] UI Code sec. 1222

[21] UI Code sec. 1223

[22] UI Code sec. 1224

[23] UI Code sec. 1224

11. If the board affirms the ALJ's decision, the decision becomes final 30 days after you are notified of the board's decision.

You can use a legal mechanism called a "writ of mandamus" to ask a judicial court to overturn the disability benefit decisions of the Unemployment Insurance Appeals Board (which also applies in UI cases). However, you cannot use the same legal mechanism to ask a court to review a tax assessment case.[24] These claims must be filed in a court of competent jurisdiction in Sacramento County.

Notifying EDD of Business Change

You must notify the EDD if you cease doing business in California, sell or merge your business, transfer majority ownership or otherwise significantly change the form of your business. Under some of these conditions, you must file a final tax return and pay all contributions due.

For more information, download the *California Employer's Guide 2015*, commonly known as the *Form DE 44 - California Employer's Guide*, from the EDD's website at www.edd.ca.gov/payroll_taxes/Employers_Guides.htm.

Quitting Business or Changing Ownership

If you go out of business, you must make a report to the EDD's director. You must also make a similar report if you transfer 50 percent or more ownership control of your business to a new owner:[25]

- If you close your business, you must file a final *Form DE 88 - Payroll Tax Deposit* with payment, and *Form DE 9 - Quarterly Contribution Return and Report of Wages* and *Form DE 9C - Quarterly Contribution Return and Report of Wages (Continuation)* within 10 days of quitting business, regardless of the normal due dates.
- For the EDD to close your employer account, you must complete Box B on the *DE 9*, and Box D on the *DE 9C*.
- You can inactivate your account using the EDD's Expanded e-Services for Business website at https://eddservices.edd.ca.gov.
- NOTE: Mail each form — the *DE 88* with payment and the *DE 9* and *DE 9C* separately — to the preprinted address shown on the forms.

Business Acquisitions and Mergers

If a business or corporation (employing unit) is acquired by another business or corporation, the account number of the surviving entity will remain active. The EDD will inactivate the account number of the acquired entity. The surviving entity can request transfer of the reserve account of the acquired entity to lower the tax rate of the surviving entity.

If the business or corporation changes in form (sole proprietorship to partnership, sole proprietorship or partnership to corporation, etc.), but continuity of control of the business does not change, a new employer is not created.

If two or more business enterprises are united by factors of control, operation and use, the EDD's director can determine that the business enterprises constitute one employing unit. If that occurs, that employing unit must pay unemployment compensation or disability insurance contributions under one consolidated account number. The EDD will consolidate the UI reserve account and the new rate assigned for the current year.

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[24] UI Code sec. 1241

[25] UI Code sec. 1116

For more information, download the *California Employer's Guide*, commonly known as the *Form DE 44*, from the EDD's website at www.edd.ca.gov/payroll_taxes/Employers_Guides.htm.

Coordinating SDI With Other Benefits

Because SDI benefits do not entirely replace wages not earned during a covered absence, employees will seek your assistance in determining if other payments can be received to supplement SDI benefits. This section guides you through coordinating SDI with other sources of income.

SDI and Workers' Compensation

SDI partially compensates loss of earnings due to sickness and injury not covered by workers' compensation. However, employees receiving workers' compensation can qualify for some disability insurance payments if the workers' compensation payments fall below the payments they could receive from SDI. Employees can receive the difference between workers' compensation payments and disability insurance payments from the SDI program.[26]

A person may be eligible for interim SDI benefits if you or your workers' compensation insurance carrier denies or delays workers' compensation payments. If an employee receives SDI benefits while a workers' compensation case is pending, the EDD will file a lien to recover those benefits if the workers' compensation claim is resolved in the employee's favor.

SDI and Unemployment Insurance

If a person receives UI benefits from the federal government or any state, he/she cannot also receive SDI for the same period. If the EDD determines that a person applying for SDI has a right to UI payments, it will deny SDI benefits.[27] Failure to apply for or collect UI benefits does not ensure eligibility for SDI.

SDI and Pregnancy Disability

Disabilities arising from pregnancy, childbirth and related medical conditions are classified the same as any other temporary disability for purposes of SDI. The usual disability period for a normal pregnancy is up to four weeks before the expected delivery date and up to six weeks after the actual delivery.

A woman's physician may certify that she is disabled for a longer period before or after the expected delivery if the delivery is a cesarean section, if medical complications exist, or if she is unable to perform her regular or customary job duties.

In determining if SDI benefits will extend beyond the usual disability period for a normal pregnancy, the EDD will assess all factors, including the employee's:

- Age
- Occupation
- Job limitations
- Prior pregnancy history
- Current medical condition

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[26] UI Code sec. 2629

[27] UI Code sec. 2628

- The medical provider's certification that the employee is unable to do her regular or customary work

A pregnant employee may also be entitled to up to four months of protected leave, known as Pregnancy Disability Leave (PDL), for her pregnancy, childbirth and/or related medical conditions. More information on your duties under California's pregnancy disability leave laws can be found in Chapter 19, "Pregnancy Disability Leave (PDL)." Employees eligible for PDL or PDL running concurrently with FMLA can receive SDI payments during the period of PDL disability. After the employee is no longer disabled, both the protected leave and SDI benefits end.

For further information on how SDI can interact with PDL and FMLA, CalChamber members can use our Leave Interaction Wizard on hrcalifornia.com.

SDI and Other Types of Disability

An employee absent for his/her own disability that is not related to pregnancy or a work-related illness or injury may also be eligible for FMLA/CFRA leave (see Chapter 18, "Family and Medical Leave"). The employee eligible for SDI benefits could receive those benefits during the FMLA/CFRA leave and up to an additional 40 weeks of SDI benefits beyond the right to the protected leave. The actual amount of time the employee can draw SDI benefits depends on his/her earnings in the base period before the disability began.

Other Federal and State Programs Related to SDI

Payments from federal and state liability programs, such as the federal Employers Liability Act and the Longshoremen and Harbor Workers Act, may also reduce SDI benefit payments.[28]

SDI and Other Wages

Vacation is not considered a form of wages for the purpose of SDI benefits. You can require or allow employees to use vacation while they receive SDI benefits or to supplement SDI benefits.

Paid sick leave and PTO are a form of wage replacement for SDI benefit purposes. An employee cannot receive more money than he/she would normally make if at work. Thus, an employee cannot receive SDI benefits for any period for which the employee also receives sick leave wages equivalent to his/her full salary. You can, however, require or allow an employee to use sick pay or PTO during the seven-day waiting period for SDI benefits to begin. After the employee begins receiving SDI benefits, you can require or allow him/her to use partial sick pay or PTO to supplement the SDI benefits. You should coordinate this type of payment with your local EDD office. It is your responsibility to ensure that the employee is not receiving more than 100 percent of his/her normal gross wages when receiving integrated/coordinated wages from you in conjunction with the SDI amount.

If the employee takes leave under FMLA or CFRA and receives any type of disability benefits, including SDI benefits, you cannot require the employee to use paid sick leave, vacation or other PTO during the FMLA/CFRA leave. For more information, see "Pay and Benefits During Family and Medical Leave" in Chapter 18, page 495. However, employers and employees may agree to have paid leave supplement the disability plan benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary.[29]

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[28] UI Code sec. 2629

[29] 29 CFR 825.207

You can require the employee on PDL or PDL/FMLA to use sick leave if the leave is unpaid but you cannot require the employee to use vacation or other PTO during the leave.

California employers were required to begin providing mandatory paid sick leave benefits on July 1, 2015 (AB 1522/the Healthy Workplaces, Healthy Families Act). At the time of publication, the Employment Development Department has not provided guidance as to how mandatory paid sick leave will be treated for SDI purposes. This mandatory paid leave may be treated the same as employer provided sick days were treated by EDD in the past. In other words, an employee would not be eligible for SDI benefits on days that he/she received full salary under the paid sick leave mandate. For more information, see Chapter 20, "Paid Sick Leave."

Consult legal counsel with any questions regarding integration of benefits and continue to check the EDD website, at www.edd.ca.gov, for more information.

Health Insurance and SDI

The law does not generally require you to provide paid health insurance or other benefits during an employee's disability leave. Exceptions include:

- Employers covered by federal and state family leave laws (employers with 50 or more employees and public agencies), are required to provide up to 12 weeks of continued benefits.
- Employers covered by state pregnancy disability leave law (employers with five or more employees) are required to provide up to four months of continued benefits.
- Where you provided those benefits during leaves in the past, which set a precedent.

Filing an SDI Claim

Claims for state SDI benefits are filed by the employee with the EDD. Claims should be submitted promptly to EDD once the employee has a wage loss that may be covered by SDI. Claim forms are available from any EDD office or via the EDD's website at www.edd.ca.gov/disability/New_Claim_for_DI_Benefits.htm.

Determining Eligibility for SDI

Individuals entitled to disability insurance benefits can receive compensation for mental or physical conditions, including pregnancy (see "SDI and Pregnancy Disability" on page 385), that prevent them from performing their customary work.

An employee is considered disabled on any day in which he/she is:

- Certified disabled by his/her physician.
- Ordered not to work by a written order from a state or local health officer because he/she is infected with or suspected of being infected with a communicable disease.
- Being medically treated for acute alcoholism or acute drug-induced illness.[30]

To receive SDI benefits, an individual must be covered by one of the SDI plans (see "Employment Covered by SDI" on page 381) and meet all of the following requirements:

- Be unable to perform his/her regular or customary work.

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[30] UI Code sec. 2626

- Have a loss of wages because of a disability.
- Be disabled at least eight calendar days.[31]
- Be under the care and treatment of a physician or practitioner who certifies that the individual is disabled.[32] Certification can be made by:
    - A licensed medical or osteopathic physician and surgeon, chiropractor, dentist, podiatrist, optometrist, designated psychologist or an authorized medical officer of a U.S. government facility.
    - A licensed midwife, nurse-midwife or nurse practitioner can certify pregnancies. In some instances, an authorized and accredited religious practitioner may certify a pregnancy.[33]
- Mailed a timely claim for SDI benefits within 49 days from the date of becoming disabled. The EDD can extend this time if the individual can establish good cause for filing late.
- Be employed or actively looking for employment when the disability began.
- Earned at least $300 during a previous 12-month base period, from which SDI taxes were withheld.

Individuals who are residents in licensed drug-free residential facilities or alcoholic recovery homes and/or referred there by a physician, are eligible for the following disability benefits:

If the individual resides in a:	**The disability benefit period is:**
Drug-free residential facility	Up to 45 days for resident services; if the referring physician certifies, up to an additional 45 days for continuing resident services
Alcoholism recovery home	Up to 30 days for resident services; if the referring physician certifies, up to an additional 60 days for continuing resident services

Facilities must:

- Be located in California or be licensed by the state in which they are located and recommended by the referring physician.
- Certify that the individual is participating in an approved drug-free residential program[34] or alcoholic recovery program.[35]

Filing Period for SDI

After an individual suffers unemployment resulting from disability, he/she must file a claim for disability benefits within 49 days of the first day of disability, although the EDD's director can extend this time for good cause.[36] The EDD provides a form that individuals must use in making the claim, *Form DE 2501 - Claim for State Disability Insurance Benefits*. The application for disability benefits must be accompanied by a certificate from a physician or religious organization. The EDD will return incomplete forms to the claimant for resubmission within 10 days.

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[31] UI Code sec. 2627

[32] UI Code secs. 2627, 2709

[33] UI Code secs. 2627, 2709

[34] UI Code sec. 2626.2

[35] UI Code sec. 2626.1

[36] UI Code sec. 2706.1

If an individual files a claim for subsequent disability arising from the same cause as the initial disability and not separated by more than 14 days from the original disability, the EDD uses a single disability period.

The Unemployment Insurance Code has been amended to reflect that a second claim filed within 60 days of the initial claim will be considered one disability benefit period. This change will be effective July 1, 2016.[37]

The individual must file an application for subsequent period benefits within 49 days after the subsequent period of disability begins.

Providing Employee Information for SDI

After the claimant initially applies for benefits, his/her last employer receives notice of the claim (*DE 2503 - Notice to Employer of Disability Claim Filed*).[38] An employer must notify the EDD of any information relevant to eligibility within two working days. However, if the claimant ceased working for an employer, the employer can transmit information about eligibility either two working days after notice or five working days after termination, whichever is later.[39]

Determining Ineligibility for SDI Payments

An employee cannot receive SDI payments if he/she is:

- Receiving unemployment insurance payments
- Receiving full wages
- In legal custody as a result of a conviction or when confined by court order
- Receiving workers' compensation at a weekly rate equal to or greater than the SDI rate

People involved in trade disputes who are ineligible for UI benefits do not lose SDI if they otherwise qualify for those benefits.

An individual may be denied SDI benefits if he/she has been confined or institutionalized as an alcoholic, drug addict or sexual psychopath, despite being otherwise qualified. This disqualification ends with release from confinement.[40]

People who willfully make false statements or conceal material facts to obtain disability benefits are disqualified, which can last from seven to 35 days.[41] Time will not be counted as satisfying this period of disqualification unless the claimant remains, in all other respects, eligible for benefits. A subsequent offense of this kind carries a disqualification up to 56 days.[42]

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[37] UI Code sec. 2608(a)

[38] UI Code sec. 2707

[39] UI Code sec. 2707.1

[40] UI Code sec. 2678

[41] UI Code sec. 2675

[42] UI Code sec. 2675

SDI Disqualifications

Disqualification from UI also creates a presumption of ineligibility for state disability benefits.[43] This presumptive disqualification covers people who:

- Leave work without good cause and voluntarily
- Are terminated for misconduct
- Give false information or refuse to apply for or take suitable employment
- Fail to report to a public employment office during a prior disqualification period
- Are additionally disqualified by the EDD's director for not having a bona fide illness or injury for successive quarterly periods covered by the benefits[44]

A disqualification for disability benefits on grounds that the claimant lacks UI eligibility will last as long as the unemployment disqualification lasts.[45] But a claimant may be eligible for SDI benefits if he/she can show that the unemployment is the result of an illness or injury and that he/she otherwise meets disability requirements.[46] For more information on UI, please see Chapter 16, "Unemployment Insurance."

Any individual who, with the intent to defraud, falsely certifies the medical condition of any person to obtain disability insurance benefits may receive a fine up to $20,000, up to one year imprisonment, or both.[47]

Appealing the EDD's SDI Decision

The EDD evaluates all information and determines eligibility. If the EDD finds the claimant has no right to SDI benefits, the agency notifies the claimant.[48]

Within 20 days of receiving a notice of benefit amounts, an eligible claimant can protest to the EDD. If the EDD denies the claim for benefits, the claimant can appeal to an Administrative Law Judge (ALJ) within 20 days. The period for appealing eligibility or computation questions can be extended for good cause.[49]

In addition, the EDD can act on its own to reconsider prior rulings on benefits or eligibility. The EDD must notify the claimant of any reconsideration. The claimant has a right to appeal the decision in the same manner as an original ruling. To reconsider a decision, the EDD must have good cause. It can undertake reconsideration only within the time before a claimant's appeal.

Employees and employers can appeal a decision of the ALJ to the Unemployment Insurance Appeals Board using procedures for appeals in unemployment compensation cases.[50]

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[43] [illegible]
[44] [illegible]
[45] [illegible]
[46] [illegible]
[47] UI Code [illegible]
[48] UI Code sec. 2707
[49] UI Code [illegible]
[50] UI Code secs. 1334, 1336

SDI Benefit Payments

The EDD pays SDI benefits to the employee weekly, based on a seven-day workweek (regardless of the number of days per week an employee normally works).

SDI Benefit Amounts

The weekly benefit amount is approximately 55 percent of the wages the employee earned in the highest quarter of the base period (see “SDI Benefits Base Period” on page 391).

Weekly benefit payments range between $50 to $1,104. To qualify for the maximum weekly benefit amount ($1,104), an individual must earn at least $26,070.92 in a calendar quarter during the base period.

SDI Benefits Coverage Period

There is a seven-day waiting period before disability benefits begin.[51]

The Unemployment Insurance Code has been amended so that the seven-day waiting period is waived for someone who has already served the waiting period for an initial disability and then files a second disability benefits claim for the same or related condition within 60 days after the first claim. This change is effective July 1, 2016.[52]

The maximum benefit amount is 52 times the weekly benefit amount or the total wages earned in the base period, whichever is less. An individual can be paid for periods longer than 52 weeks if his/her benefits are reduced because he/she returned to work on a part-time basis or received other money during the disability period.

SDI Benefits Base Period

The EDD calculates weekly benefit amounts using a base period which covers 12 months and is divided into four consecutive quarters of three months each. The base period includes the wages an individual was paid approximately six to 18 months before the disability claim began, if those wages were subject to the SDI tax. The base period does not include wages paid just before the disability began.

The base period for a claim is determined as follows:

For claims beginning in:	**Base period is 12 months ending the previous:**
January, February and March	September 30
April, May and June	December 31
July, August and September	March 31
October, November and December	June 30

The quarter with the highest amount of earnings in the base period determines the weekly rate. For a disability claim to be valid, a claimant must have earned at least $300 in wages in the base period. Wages also include all tips received while performing services that constitute employment, included in a written statement furnished to you pursuant to section 6053(a) of the Internal Revenue Code. Any wages owed to the claimant but unpaid within legal time limits also are counted as wages for the quarter in which they were earned.[53]

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[51] UI Code sec. 2627

[52] UI Code sec. 2627(b)

Taxes on SDI Benefits

SDI benefits are taxable only if they are received in place of UI benefits.

Partial SDI Benefits

An individual who returns to work part-time but suffers a partial loss of wages can receive partial SDI benefits. SDI makes up the difference between the part-time wages and the wages earned before the disability began, but only up to the weekly benefit rate amount. If the wage loss is greater than the weekly disability benefit amount, benefits are paid at the full rate. If the wage loss is less than the weekly disability benefit amount, benefits are the amount of the wage loss only.

EDD Elective SDI Coverage Program

Small business owners and self-employed individuals that are excluded from coverage under the state plan can apply for disability insurance coverage through the Disability Insurance Elective Coverage (DIEC) program.[54] Certain requirements must be met and the EDD's director must approve the applications.

The EDD files elective coverage in the same manner as state plan claims. However, there are some differences in eligibility requirements from those listed at www.edd.ca.gov/disability/Eligibility.htm. For additional information or to apply for coverage, contact EDD's Disability Insurance Customer Service at (800) 480-3287 or EDD's Taxpayer Assistance Center at (888) 745-3886.

If the services that an employee performs for you are excluded from disability insurance coverage under the state plan or a voluntary plan, you can file a written election notice with the EDD's director that states that you consider these services performed by an employee to constitute employment.[55] For more information, see Chapter 16, "Unemployment Insurance."

A school district can elect coverage for disability insurance for the members of a bargaining unit created by the Educational Labor Relations Law.[56] This coverage applies only if a negotiated agreement between you and the members of the employee unit mandates the coverage. The district can also choose coverage for its management and confidential employees. This coverage is independent of coverage for the unit.

Counties, cities and special districts can elect coverage for members of a bargaining unit created by the Myers-Milias-Brown Act.[57] Coverage applies pursuant to a negotiated agreement between an employer and members of the employee unit. Upon approval, an employer withholds disability insurance contributions from the wages of employees covered by the plan. The local government can choose coverage for its management or confidential employees and its employees who are not part of an existing collective bargaining unit.

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[53] UI Code sec. 2654

[54] UI Code sec. 708.5

[55] UI Code sec. 702

[56] UI Code sec. 710.4

[57] Govt. Code sec. 3501

Voluntary SDI Plans

The law allows you to operate a voluntary plan in lieu of the state coverage. You must make a formal application, receive the EDD's approval and ensure ongoing accountability for the plan's operation.[58] The coverage, rights and benefits under a voluntary plan must be equal to the state plan in all respects and better in at least one provision. A majority of the employees eligible for coverage must approve the plan before it goes into effect.

With the exception of some allowable exclusions, you must offer everyone coverage. These exclusions are part-time or short-term employees, as defined by the EDD, or all employees in one or more of your locations.

Under a voluntary plan:

- You pay an assessment to the EDD based on wages paid to the covered employees.[59]
- You also pay a security deposit to the state treasurer to ensure payment of plan obligations.[60]
- You must no longer send state disability contributions to the EDD for employees choosing coverage under the voluntary plan, after a voluntary plan is approved.[61]
- You can withhold up to the same amount of contributions from the employees and hold the money in trust to pay claims and approved expenses incurred in administering the plan.
- You can choose to withhold a lesser amount or even totally fund the voluntary plan program without any cost to employees.

The law requires that a voluntary plan be underwritten by an insurance company or be self-insured. However, the adverse risk stipulations put on insurance companies make it very difficult for the companies to write policies that can underwrite a voluntary plan.[62] For details on applying for a voluntary plan, see www.edd.ca.gov/Disability/Employer_Voluntary_Plans.htm.

You must submit the formal application for a voluntary plan no later than the proposed effective date. A seven-day extension is possible with previous approval from the EDD.[63]

In addition to the application form, you must submit:

- A text document outlining all features of the plan
- A Statement of Coverage that will be distributed to all covered employees[64]
- A copy of the enrollment literature used to solicit employee consent
- A security deposit to guarantee meeting all obligations

After the EDD approves the plan, you remain accountable to the state. You must file a form with the EDD for each claim received and again when benefit payments are completed,[65] and also submit a financial report of the plan transactions each year.[66]

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58. UI Code sec. 3251
59. UI Code sec. 3252(b)
60. UI Code sec. 3258
61. UI Code sec. 3252
62. UI Code sec. 3255(i)
63. 22 Admin. Code sec. 3251-1(a)
64. 22 Admin. Code sec. 3254-1(f)
65. 22 Admin. Code sec. 3267-1(a)
66. 22 Admin. Code sec. 3267-2

Paid Family Leave (PFL) Defined

PFL is a state-sponsored insurance program within the SDI program. PFL covers employees at organizations of any size. PFL provides employees with partial wage replacement for up to 6 weeks in any 12-month period while absent from work to care for a seriously ill or injured family member or bonding with a minor child within one year of the child's birth or placement in connection with foster care or adoption.

Like SDI, Paid Family Leave (PFL) does not create the right to a leave of absence. PFL does not require you to create a leave of absence policy or guarantee reinstatement rights other than those already mandated by law. If you withhold SDI contributions from employees' paychecks, you are also withholding for PFL.[67]

As with SDI, PFL is administered by the EDD, and employees apply directly to the EDD for benefits. The EDD is also responsible for the process of confirming if the absence qualifies for benefits. The EDD can require medical and other documentation in support of the claim.

State law requires an employee poster, included in the ***California and Federal Employment Notices Poster***, and an information brochure to be given to each employee upon hire and when leaving work for a covered reason. These items are available from CalChamber's online store at store.calchamber.com.

An employee who is entitled to a leave of absence to care for a family member or bond with a child under the FMLA and the California Family Rights Act (CFRA) can receive PFL benefits while on FMLA and/or CFRA.

Mandatory Leave Laws and PFL

This table shows the relationship between state and federal mandatory leave laws and California's PFL benefits:

Issue	FMLA, CFRA, PDL leaves of absence (state and federal law)	PFL wage replacement during a leave of absence (state law)
Employer coverage	FMLA & CFRA — 50 or more employees PDL — five or more employees	One or more employees
Employee eligibility	FMLA & CFRA — Has worked for you for 12 months and 1,250 hours in the prior 12-month period, and works at a worksite with at least 50 employees within 75 miles of the worksite PDL — Immediate for a period of actual disability	Immediately upon employment and need for leave if the employee has earned at least $300.00 from which PFL deductions were withheld Requires seven-day waiting period (unless the employee already served the seven-day waiting period for SDI) and subject to your vacation policy requiring use of up to two weeks of vacation or PTO prior to receipt of PFL benefits

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[67] [illegible]

Issue	FMLA, CFRA, PDL leaves of absence (state and federal law)	PFL wage replacement during a leave of absence (state law)
Duration	FMLA & CFRA — 12 weeks in a 12-month period (leave is typically unpaid) or 26 weeks for servicemember leave PDL — Periods of actual disability, up to four months	Six weeks in a 12-month period Six weeks in a 12-month period
Reasons for leave	FMLA & CFRA — For the employee's own serious health condition; to care for a seriously ill child, parent or spouse; for baby bonding (bonding with a newborn child or a child placed with the employee in connection with adoption or foster care) For servicemember leave — A qualifying exigency PDL — Disability due to pregnancy or pregnancy-related conditions	To care for a seriously ill family member (parent, spouse, child grandparent, grandchild, sibling, parent-in-law or domestic partner) or for baby bonding
Requirement for medical certification	Yes, you can require medical certification	The EDD determines eligibility for benefits
Sick, vacation or PTO pay during leave	You can require the employee to use accrued benefits such as sick, vacation or PTO while on FMLA/CFRA leave if the leave is unpaid. However, if the employee is receiving pay under a disability benefits plan (such as PFL), they cannot be required to use those benefits You can require the employee to use sick time while on PDL if the leave is unpaid but you cannot require the use of vacation or other accrued PTO during PDL	You can require the employee to take up to two weeks of accrued vacation or PTO before becoming eligible for benefits
Reinstatement rights	You must reinstate the employee to the job held prior to the need for leave	Creates no reinstatement rights. The right may exist under some other law or organization policy
Continuation of benefits	The employee is entitled to the same level of benefits as if he/she were still on the payroll. The employee pays any contribution they would pay if they were at work	No benefit continuation unless it exists under some other law

Issue	**FMLA, CFRA, PDL leaves of absence (state and federal law)**	**PFL wage replacement during a leave of absence (state law)**
Relationship to current leave laws	FMLA & CFRA run concurrently unless the employee is disabled by pregnancy or the leave is to care for a registered domestic partner or leave related to military service. If the employee is disabled by pregnancy, PDL runs concurrently with FMLA and the employee will be entitled to CFRA after she is no longer disabled by the pregnancy An employee in a registered domestic partnership is not entitled to FMLA to care for his/her domestic partner, but is entitled to CFRA for that purpose. Leave related to military service may be FMLA-only (26 weeks of FMLA leave is allowed. 12 weeks may run concurrently with CFRA if for a CFRA qualifying reason.)	PFL benefits are available to eligible employees on FMLA/CFRA leave to care for a seriously ill family member (parent, spouse, child grandparent, grandchild, sibling parent-in-law or domestic partner) or for baby bonding

PFL Qualifying Events

To be eligible for PFL benefits, the employee must need leave to:

- Care for a seriously ill family member
- Bond with the employee's new child, the new child of the employee's spouse or domestic partner or a child in connection with the adoption or foster care placement of the child with the employee or the employee's spouse or domestic partner[68]

A "seriously ill" family member includes a parent, spouse, child, grandparent, grandchild, sibling, parent-in-law or domestic partner.

Determining Eligibility for PFL

There is a seven-day waiting period before PFL benefits begin.[69] If a claim for PFL is filed following a pregnancy-related SDI claim, there is no seven-day waiting period.[70]

The seven-day waiting period need not be taken seven days in a row. For example, if care was provided one day per week, the seven-day waiting period would be served over a seven-week period. Benefits would be payable after the seven days were served and all other eligibility requirements met.

Eligible employees must:

- Be covered by SDI or a voluntary plan in lieu of SDI and have earned at least $300 from which deductions were withheld
- Complete all claim forms
- Supply medical information to support their claim
- Provide required documentation if leave is to bond with a new child

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[68] UI Code sec. 3301

[69] UI Code sec. 3303

[70] UI Code sec. 3302.1

- Use up to two weeks of paid vacation if you require it

Benefits are payable for any day in which the employee is unable to perform his/her regular customary work due to a covered absence.

Benefits are available for any day that warrants the participation of the employee, including providing psychological comfort and arranging third-party care for the family member, as well as directly providing or participating in the medical care.

Determining Ineligibility for PFL

An individual cannot receive PFL payments if he/she is:

- Receiving SDI benefits
- Receiving unemployment or workers' compensation benefits
- Not working or looking for work
- Not suffering a loss of wages (receiving disability benefits, including SDI, paid sick leave or PTO)
- Unable to prove that there is a need for care through documentation by the ill individual's health care provider
- In custody as a result of a conviction for a crime

Employees are also not eligible for any day that another family member is able and available for the same period of time that the individual is providing the required care.

Taxing PFL Benefits

The IRS ruled that benefits received under California's PFL program are taxable for federal income tax purposes. The benefits are not subject to California income tax.

Defining PFL-Related Terms

The following are important definitions related to PFL:

- "Child" includes a biological, adopted or foster son or daughter, a stepson or stepdaughter, a legal ward, a son or daughter of a domestic partner or the person to whom the employee stands in *loco parentis*.
- "Domestic partner" is one who qualifies under section 297 of the Family Code.
- "Parent" includes a biological, foster or adoptive parent, a stepparent, a legal guardian or other person who stood in *loco parentis* to the employee when the employee was a child.
- "Serious health condition" means an illness, injury, impairment or physical or mental condition that involves inpatient care in a hospital, hospice or residential health care facility or continuing treatment or continuing supervision by a health care provider.
- "Spouse" is a partner to a lawful marriage.[71]
- "Grandchild" means a child of the employee's child.
- "Grandparent" means a parent of the employee's parent.

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[71] UI Code sec. 3302; Cal. Admin. Code sec. 3302-1

- "Parent-in-law" means the parent of a spouse or domestic partner.
- "Sibling" means a person related to another person by blood, adoption, or affinity through a common or legal or biological parent.

Funding PFL

The PFL program is funded entirely through increased employee contributions to the SDI fund. The Legislature provided for the addition of these benefits to voluntary plans permitted under section 3254 of the Unemployment Insurance Code.

Integration and Coordination of PFL With Other Benefits

Employees who meet all of the eligibility requirements can be paid for up to six weeks in a 12-month period. The weekly benefit amount is based on the employee's wages in the highest quarter of the employee's base period. Weekly benefits range from $50 to a maximum of $1,104. To qualify for the maximum weekly benefit amount ($1,104), an individual must earn at least $26,070.92 in a calendar quarter during the base period.

PFL benefits are not paid for leave for the employee's own disability. However, if the employee wants to take time off for baby bonding or to care for a seriously ill family member, he/she can receive PFL benefits during the time that is also designated FMLA or CFRA.

If an employee takes up to 12 weeks of FMLA/CFRA to care for a seriously ill parent, spouse or dependent child, or up to 26 weeks to care for an ill or injured servicemember, the employee may be eligible for PFL benefits for up to six weeks in a 12-month period.

PFL and PDL

An employee disabled by pregnancy is eligible for SDI benefits, but not eligible for PFL benefits. However, after she is no longer disabled by the pregnancy (and her SDI benefits cease), she can apply for PFL benefits during the time she takes off to bond with her new child.

PFL and Family Medical Leave

PFL benefits are payable only when an individual is caring for a family member or bonding with a new child.[72] An eligible employee could receive PFL payments for a maximum of six weeks in a 12-month period while on FMLA/CFRA leave to:

- Care for a seriously ill spouse, parent, dependent child or domestic partner.
- Bond with a new child of the employee, his/her spouse or domestic partner or one placed with the employee for adoption or foster care.

For further information on how PFL may interact with FMLA, CalChamber members can use the Leave Interaction Wizard on hrcalifornia.com.

PFL benefits are available to care for family members not covered by FMLA/CFRA (grandparent, grandchild, sibling or parent-in-law).

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[72] UI Code sec. 3301

PFL and Other Wages

You can require the use of up to two weeks of vacation time when an employee applies for PFL benefits. The first week of vacation pay would be applied to the seven-day waiting period before PFL benefits begin.[73]

Because PFL benefits do not totally replace an employee's earnings, you can require or allow the use of paid sick leave, PTO and/or vacation to supplement PFL payments. You can require the employee to use other paid time off to supplement PFL benefits if you maintain a policy that requires the use of other paid time off to supplement benefit payments and the paid time off applies to this type of absence.

If an employer wants to coordinate PFL with other wages, the employer must remember that it is the responsibility of the employer and the employee to ensure that the employee is not receiving more than 100 percent of his/her normal gross wages when receiving coordinated or integrated wages from the employer. For purposes of SDI and PFL, vacation is not considered a form of wages. The most common type of payments that are considered wages for SDI or PFL purposes are sick leave, bereavement pay, back pay and earnings.

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California employers were required to begin providing mandatory paid sick leave benefits on July 1, 2015 (AB 1522/the Healthy Workplaces, Healthy Families Act). At the time of publication, the Employment Development Department has not provided guidance as to how mandatory paid sick leave will be treated for PFL purposes. This mandatory paid leave may be treated the same as employer provided sick days were treated by EDD in the past. In other words, an employee would not be eligible for PFL benefits on days that he/she received full salary under the paid sick leave mandate. For more information, see Chapter 20, "Paid Sick Leave."

Consult legal counsel with any questions regarding integration of benefits.

PFL Benefit Payments

After a seven-day waiting period for each claim, an individual is eligible to receive benefits equal to one-seventh of his/her PFL weekly benefit amount for each full day during which he/she is unable to work while caring for a seriously ill or injured family member or bonding with a minor child within one year of the birth or placement of the child in connection with foster care or adoption. The maximum amount payable to an individual during any disability benefit period is six times his/her weekly benefit amount, but not more than the total wages paid to the individual during his/her disability base period.[74]

No more than six weeks of PFL benefits are paid within any 12-month period, meaning the 365 consecutive days that begin with the first day the individual establishes a valid claim for PFL benefits. Employees are not required to take all of their PFL benefits at one time.

Periods of leave for the same care recipient within a 12-month period, periods of disability for pregnancy and periods of leave for bonding associated with the birth of that child are each considered one disability benefit period.[75]

As a condition of an employee's initial receipt of PFL benefits during any 12-month period, you can require an employee to take up to two weeks of earned but unused vacation leave prior to the employee's initial receipt of these benefits. The first week of that vacation is applied to the waiting period.[76]

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[73] UI Code sec. 3303.1

[74] UI Code sec. 3301

[75] UI Code sec. 3302.1

[76] UI Code sec. 3303.1

An employer with union-represented employees retains a duty of collective bargaining about this benefit. You can coordinate PFL with sick pay and PTO benefits with the EDD to maximize an employee's PFL benefits. Check with EDD or legal counsel on coordination of mandatory paid sick leave with the PFL benefit.

The weekly PFL benefit amount is based on the employee's highest quarter of earnings in his/her base period.

State Disability Insurance and Paid Family Leave Benefit Amounts

SDI and PFL: Transfers and Reinstatement

Employees who receive SDI or PFL payments have no protected rights — including no rights to transfers, continued employment, employee benefits and reinstatement — unless the rights exist by provision of some other law or your policy or practice.

The continuation of benefits does not exist because the employee receives SDI or PFL benefits. However, if the payment of SDI or PFL benefits occurs during a protected leave (PDL, FMLA and/or CFRA), the employee would continue to receive benefits at the same level as if he/she were at work. See Chapter 18, "Family and Medical Leave," and Chapter 19, "Pregnancy Disability Leave (PDL)," for more information on the requirement to continue health benefits.

Complying with SDI and PFL Laws

To comply with SDI and PFL laws:

- Post *DE 1857A - Notice to Employees: Unemployment Insurance, State Disability Insurance and Paid Family Leave* in the workplace. This notice is part of CalChamber's ***2016 California and Federal Employment Notices Poster***.
- Deduct SDI and PFL taxes from employees' wages according to the rates set by the EDD.
- Make appropriate payments to and file reports with the EDD.
- Implement a method of tracking employee absences and notifying employees in writing of the designation of leave as one or more of the above types of leave.
- Make sure employee handbooks include any requirements for the use of vacation, sick pay or PTO during an absence or leave of absence. This might include absences that are also PDL, FMLA, CFRA, workers' compensation, disability as an accommodation and kin care.
- Check with EDD regarding coordination or integration of SDI/PFL with the mandatory paid sick leave that employers were required to provide beginning in July of 2015.
- Provide new hires with the *DE 2515 - State Disability and Insurance Provisions* and *DE 2511- Paid Family Leave* pamphlets.
- When an employee becomes disabled or is absent for a reason that would qualify for SDI or PFL benefits, provide the employee with all of the following pamphlets:
  - *DE 2515 - State Disability Insurance Provisions*
  - *DE 2320 - For Your Benefit, California's Program for the Unemployed*
  - *DE 2511 - Paid Family Leave*

- Designate the leave as a mandated leave (FMLA, CFRA, etc.) or an organization policy specified leave.
- Get an expected return to work date from the employee.
- When the leave of absence begins, send the employee the *Notice to Employee as to Change in Relationship*.
- Notify employees when any leave has expired or been exhausted.
- Consult legal counsel before taking disciplinary action or terminating anyone on any protected leave or taking a mandated benefit.

Notice to Employee as to Change in Relationship

Unemployment Insurance

The unemployment insurance (UI) system in the United States is a federal and state program. In California, employers finance the cost of the program through state and federal UI taxes. You can substantially reduce the UI tax you pay by carefully monitoring the Employment Development Department (EDD) tax bills and protesting claims by ineligible former employees. The UI tax is one of the few employment-based taxes that you can reduce.

This chapter explains how UI is financed and which wages are subject to UI taxation. You will learn which employers are covered and what the employer obligations are. This chapter also discusses UI claims, how to respond to them and how UI interacts with other benefits, such as vacation pay.

Wages Subject to Unemployment Insurance Taxes

Payments by the day, by the hour, by piece rate or any other measurement are wages for purposes of unemployment insurance even if the employee is called a casual worker, day laborer, contract laborer or other term, or works on a part-time or temporary basis. Wages that you pay to workers are taxable.

"Wages" include all compensation that you pay to an employee for services performed in covered employment, including:

- Salary
- Commissions
- Bonuses
- Piece rate wages
- Reasonable cash value for payment in-kind, such as meals and lodging
- Tips
- Amounts in lieu of cash wages to offset an employee's debts
- Sickness and accident payments, except those made under workers' compensation law
- Fringe benefits that you provide or pay for, such as use of the organization car, parking, etc.
- Pension and retirement contributions you make, unless the contributions go to a qualified plan
- Your contributions under a qualified cash or deferred arrangement, such as a 401(k) or Roth IRA. The employee contributions must be excluded from his/her gross income under section 402a8 of the Internal Revenue Code (IRC).
- Your contributions under a state pickup plan, such as a pension plan. Your contributions must be made as a result of a salary reduction agreement, in which the employee elects an amount of taxable income to be voluntarily withheld from his/her pay.
- Amounts deferred under a nonqualified, deferred compensation plan
- Sick pay from third-party payers
- Sick pay from you

- Employee tax payments you make for state disability insurance and/or under the Federal Insurance Contributions Act (FICA)

In addition, wages paid by all federally recognized Indian tribes are subject to state UI taxes. Indian tribes employing one or more employees must register with the EDD.

New 2016

California employers were required to begin providing mandatory paid sick leave benefits on July 1, 2015 (AB 1522/the Healthy Workplaces, Healthy Families Act). At the time of publication, the Employment Development Department had not provided guidance as to how mandatory paid sick leave will be treated for unemployment insurance purposes. This mandatory paid leave may be treated the same as employer provided sick days were treated by the EDD in the past. Consult legal counsel and continue to check the EDD website, at www.edd.ca.gov, for further information. For more information, see Chapter 20, "Paid Sick Leave."

Payments That Are Not Considered Wages

For the purposes of UI, the following types of payments are not considered wages:

- Reimbursement of required or necessary business expenses that the employee incurs while working for you, such as travel expenses
- Insurance or annuity payments from a qualified plan to an employee for retirement
- Sickness or accident disability payments that you make to an employee more than six calendar months following the last month in which the employee worked, including third-party sick pay
- Severance payments if the purpose is to supplement unemployment compensation benefits
- Vacation or holiday pay earned but not paid before the termination of employment
- Health insurance premiums or health care expenses you pay on behalf of your employee or your employee's dependents
- Sickness or accident disability under a workers' compensation law
- Moving expenses, if it is reasonable to believe the expenses constitute an allowable deduction to the employee under the IRC section 217
- Employee achievement awards, if it is reasonable to believe the amount is excludable from gross income under IRC section 74c
- Scholarship payments or fellowship grants, if it is reasonable to believe the amount is excludable from gross income under IRC section 117
- Dependent care assistance programs, if it is reasonable to believe the amount is excludable from gross income under IRC section 129
- Payments to or from the following types of pension plans:
  - Your payments to a trust, as defined by IRC section 401a
  - An annuity plan, as defined under IRC section 403a
  - A simplified employee pension plan (SEP-IRA) unless the payment is made as a result of a salary reduction agreement
  - An annuity contract as defined under IRC section 403b, unless the payment is made as a result of a salary reduction agreement
  - An exempt governmental deferred compensation plan as defined in IRC section 3121v3

- Cafeteria plans, which provide participants an opportunity to receive some benefits on a pre-tax basis
- Payments made due to a violation of the Worker Adjustment and Retraining Notification Act (WARN). For information on the WARN Act, see Chapter 30, "Layoffs and Plant Closings."

Employers Subject to the Unemployment Insurance Tax

With few exceptions, all California employers fall under the UI law and must pay the UI tax.

Definitions of Employer and Employment

For UI purposes, an "employer" is any entity that employs one or more workers and has paid wages in excess of $100 during any calendar quarter within the current or previous calendar year.

"Employment" means "service, including service in interstate commerce, performed by an employee for wages or under any contract of hire, written or oral, explicit or implied."[1]

Typically, employment occurs when you engage the services of an employee for pay. If all of the work is performed in California, it is covered by California's UI program. If the work is performed in more than one state, there are four tests used to determine which state has jurisdiction for coverage of the employee's services:[2]

- Location of the service performed
- Base of operations
- Place from which services are controlled and directed
- Employee's residence

If a base of operations is not located in any one state, but the employee's activities generally are directed and controlled from California, the employee's services fall under California law. If a place of direction and control is not located in any one state, but the employee is a California resident and performs some services in California, the employee falls under California law.

Casual Labor

Services not in an entity's general course of trade or business will be excluded from employment unless: (1) an entity pays a worker $50 or more during any calendar quarter; and (2) the entity regularly employs the worker to provide this service. A worker is considered to be regularly employed if he/she has worked 24 days or partial days during a calendar quarter.[3]

Service that is not in an entity's general course of trade or business is work that does not advance or promote the employing entity's business.

This is the only exclusion for casual labor, which usually covers work done in connection with private residences or other noncommercial projects.

Work of any duration and wages of any amount paid by an organization to a worker are not excluded as casual labor. Wages are generally taxable unless other exclusions apply.

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[1] UI Code sec. 601

[2] UI Code sec. 602

[3] UI Code sec. 640

Specific Individuals Excluded From Unemployment Taxes

Certain individuals are excluded from coverage under the UI Code. The employment exclusions listed in this section apply to all employers.

- Workers who provide domestic service if the worker is paid less than $1,000 per calendar quarter[4]
- Transcribers of depositions, court proceedings and hearings performed away from the office of the person, firm or association obligated to produce a transcript of these proceedings[5]
- Children who are employed by their mother and/or father[6]
- Individuals who work for their children or spouses[7]
- Temporary or adjunct teachers at private postsecondary institutions[8]
- Federal employees and employees of other states[9]
- Incarcerated individuals[10]
- Workers for political candidates and election campaigns[11]
- Officers and directors of corporations not covered by the Federal Unemployment Tax Act[12]
- Students and spouses working at the student's school[13]
- Full-time students working for organized camps[14]
- Individuals working in the service of foreign governments and international organizations[15]
- Individuals working under formal agreement for agencies owned by foreign governments[16]
- Student nurses and interns working for hospitals or training schools[17]
- Students less than 22 years old in a work experience program[18]
- Patients employed by a hospital[19]
- Individuals working outside the United States on a foreign vessel or aircraft[20]
- Newspaper salespeople and delivery people under the age of 18[21]
- Real estate, mineral, oil and gas or cemetery brokers
- Real estate or cemetery salespeople

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[4] UI Code sec. 629
[5] UI Code sec. 630
[6] UI Code sec 631
[7] UI Code sec 631
[8] UI Code sec. 633
[9] UI Code sec 632
[10] UI Code sec. 633.1
[11] UI Code sec. 636
[12] UI Code sec. 637
[13] UI Code sec. 642
[14] UI Code sec. 642
[15] UI Code sec. 643
[16] UI Code sec. 644
[17] UI Code sec. 645
[18] UI Code sec. 646
[19] UI Code sec. 647
[20] UI Code sec. 648
[21] UI Code sec. 649

- Yacht brokers and salespeople[22]
- Golf caddies[23]
- Elected or appointed officials of any nonprofit fraternal corporation or association that is not covered by the Federal Unemployment Tax Act if the compensation does not exceed $100 per month[24]
- Baseball players who work for expenses and a share of profits[25]
- Jockeys and exercise boys licensed by the California Horse Racing Board[26]
- Foreign athletes for occasional professional engagements[27]
- Consultants and independent contractors[28]
- Direct salespeople who perform in-person and in-home demonstration and sales presentations of consumer products, including services or other intangibles[29]

Unemployment Insurance and Domestic Work Employers

You need not pay UI tax for domestic workers if you pay the workers less than $1,000 per calendar quarter.[30] After a worker's cash wages reach $1,000 for the calendar quarter, you must report and pay contributions on the reasonable cash value of any other compensation, such as meals and lodging. The workers can work in a private home, a local college club or the local chapter of a college fraternity or sorority. To download the EDD's *DE 231L - Household Employer's Guide*, visit the EDD website at www.edd.ca.gov/pdf_pub_ctr/de231l.pdf.

Unemployment Insurance and Independent Contractors

The distinction between independent contractors and employees is not always clear. The distinction depends greatly on the circumstances surrounding the particular employment agreement. For more information on independent contractors, see "Independent Contractors" in Chapter 6, page 96.

The EDD determines independent contractor status by examining your right to direct and control the manner and means of accomplishing work using the factors listed in "Right to Control Test" in Chapter 6, page 99.

Unlike employees, independent contractors cannot claim UI benefits. Employers do not pay UI or other payroll taxes on the independent contractor's earnings. This distinction is important. If you improperly classify employees as independent contractors, you may be held liable for thousands of dollars in back payroll taxes for the time the workers were improperly classified.

For extensive information on federal requirements for independent contractor status, visit the IRS website at www.irs.gov. To obtain information on state requirements, which vary from federal requirements, visit the EDD's website at www.edd.ca.gov.

Professional services performed by a consultant working as an independent contractor are excluded from UI coverage. According to the UI code, individuals who perform work that requires specialized

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22. UI Code sec. 650
23. UI Code sec. 651
24. UI Code sec. 652
25. UI Code sec. 653
26. UI Code sec. 654
27. UI Code sec. 655
28. UI Code sec. 656
29. UI Code sec. 650
30. UI Code sec. 682

knowledge or skills attained through course work or experience are not employees. The areas of work are limited to attorneys, physicians, dentists, engineers, architects, accountants and physical, chemical, natural and biological scientists.[31]

Unemployment Insurance and Government Entities

The following employees of governmental entities and Indian tribes are excluded from UI coverage:

- Elected officials, who are not considered employees of the governmental entity
- Members of legislative bodies or the judiciary
- Members of an Indian tribe's tribal council
- Members of the State National Guard or Air National Guard, except people who render these services as regular state employees
- Individuals hired on a temporary basis in case of fire, storm, snow, earthquake, flood or other similar emergency
- Individuals in major nontenured policymaking or advisory positions, which are designated pursuant to state and tribal law
- Individuals in policymaking or advisory positions whose duties do not require more than eight hours per week, which are designated pursuant to state and tribal law
- Election officials or election workers, if they are not expected to earn at least $1,000 in a calendar year
- Individuals in a program for rehabilitation for individuals whose earning capacity is impaired by age, physical or mental deficiency or injury
- Individuals in a program that provides compensated work for individuals who, because of their impaired physical or mental capacity, have difficulty finding employment in the competitive labor market
- Individuals who are part of a work relief or work training program that is financed by a federal or state agency or by an Indian tribe[32]

Unemployment Insurance and Nonprofit Organizations

In general, the term "employment" covers services performed in the employ of a religious, charitable, educational or other nonprofit organizations described in section 501(c)(3) of the IRC. However, the following individuals who work for one of these types of organizations are excluded from UI coverage:[33]

- Individuals employed by a church or convention or association of churches
- Individuals employed by an organization operated primarily for religious purposes, which is operated, supervised, controlled or principally supported by a church or a convention or association of churches
- Duly ordained, commissioned or licensed ministers in the exercise of their ministry
- Members of religious orders in the exercise of duties required by their order
- Individuals in a program for rehabilitation for individuals whose earning capacity is impaired by age, physical or mental deficiency or injury

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[31] [illegible]

[32] [illegible]

[33] [illegible]

- Individuals in a program that provides compensated work for individuals who, because of their impaired physical or mental capacity, have difficulty finding employment in the competitive labor market

Unemployment Insurance and Salespeople

The following salespeople are generally excluded from UI if they meet certain conditions:

- Real estate
- Mineral, oil and gas services
- Cemetery brokers
- Direct sales salespeople
- Yacht brokers

To be excluded from UI, these salespeople must meet all of the following conditions:[34]

- The individual is licensed under specific provisions of the Business and Professions Code, or is in the business of primarily in-person demonstrations and sales of consumer products in the home or sales to any buyer for resale in the home or otherwise, rather than from a retail or wholesale establishment.
- Most of the payment for services is directly related to sales rather than to hours worked.
- The individual renders services under a written contract that states that he/she will not be treated as an employee for state tax purposes.

Unemployment Insurance and Newspaper Carriers and Magazine Vendors

Individuals under the age of 18 who deliver or distribute newspapers, shipping news or magazines to consumers are excluded from UI unless the individual works full time and his/her school attendance is incidental to full-time employment.[35]

Individuals who buy newspapers or magazines at one price, sell them to consumers at a higher price and keep the difference as compensation are excluded from UI. These individuals are excluded from UI even if they are guaranteed a minimum amount of compensation or they are credited with the unsold newspapers or magazines they return.[36]

Unemployment Insurance and National Service Programs

Services performed as a participant in a national service program, such as AmeriCorps, do not constitute employment for purposes of unemployment or disability insurance[37] and are excluded from UI.

Employer's Tax Obligations

If you are covered by employment tax laws, you must register with the EDD to obtain an identification number. To obtain your identification number, file a *DE 1 - Registration Form for Commercial Employers* with the EDD. When you receive your identification number, you will also receive information about all state-required employment taxes and reporting requirements.

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34. UI Code sec. 650
35. UI Code sec. 649
36. UI Code sec. 649
37. UI Code sec. 634.5

Taxes

When you register with the EDD, the EDD establishes a reserve account for you. The account is used to determine your annual contribution rate. It also serves as a cumulative record of all the credits and charges against you since starting your business and paying wages. The EDD determines your contribution rate by a ratio of your reserve balance to the average taxable payroll in the preceding three years. A rate of 3.4 percent is required for new employers.

By February 28, the EDD notifies you of its UI rates for the entire calendar year. Every quarter, you must file with the EDD the amount of taxable wages paid and the calculated tax due. You must also include a check for the tax due. Provide this information on the *DE 3DP - Employer's Quarterly Contribution Return* and *DE 3B - Report of Wages*.

The unemployment tax wage base in California is $7,000, which is the same as the federal unemployment tax wage base.

California employers who are required to provide unemployment insurance must notify all employees that they may be eligible for the federal Earned Income Tax Credit. For more information on this requirement, see "Notification of Earned Income Tax Credit Pamphlets and Notices" in Chapter 2, page 8.

Unemployment Insurance Tax Reporting Requirements

You must file returns with the EDD about an employee's wages, contributions, taxes withheld and other required information quarterly instead of annually.[38]

You must use the following forms to fulfill the reporting requirements:

- To report total subject wages and Unemployment Insurance (UI) and Disability Insurance (DI) taxable wages and contributions, file a *DE 9 - New Quarterly Contribution Return and Report of Wages* quarterly.
- Report employee wages and personal income tax withheld quarterly on the *DE 9C - New Quarterly Contribution Return and Report of Wages (Continuation)*.

These forms replaced the *DE 7 - Annual Reconciliation Statement* and the *DE 6 - Quarterly Wage and Withholding Report*. Registered employers will receive the forms automatically by mail. These forms are also available online and at local EDD offices.

If you fail to file the quarterly returns on time, you will be subject to penalties.

New 2016

Beginning January 1, 2017, employers with 10 or more employees must file all unemployment insurance reports and returns electronically and remit all contributions for unemployment insurance premiums by electronic funds. These requirements will apply to all employers, regardless of size beginning January 1, 2018. A waiver from these requirements may be granted if the employer can establish that there is a lack of automation, a severe economic hardship, a current exemption from filing electronically for federal purposes, or other good cause.[39]

Domestic Service Employer Tax Filing

If you employ domestic service employees, you choose whether to report their wages by telephone or mail. You can file all reports of wages by telephone, except for IRS *Form W-2*. You can pay the required UI contributions by credit card.[40]

[illegible]

[illegible]

Federal Unemployment Tax

The Federal Unemployment Tax Act (FUTA) provides guidelines to states in setting up their UI programs. A 6.0 percent federal tax is imposed on all employers on wages of up to $7,000 annually per worker. Employers can receive a 5.4 percent credit when they participate in a state UI program, making the effective FUTA tax 0.8 percent. The FUTA tax is due January 31 of each year. File federal *Form 940 - Employer's Annual Federal Unemployment (FUTA) Tax Return* and *Form 8109 - Federal Tax Deposit Coupon*.

California is a "credit reduction state" because it has taken loans from the federal government to meet its state unemployment benefits liabilities and has not repaid the loans within the allowable time frame. A reduction in the usual credit against the full FUTA tax rate means that employers paying wages subject to UI tax in California will owe a greater amount of tax. The Department of Labor (DOL) runs the loan program and announces any credit reduction states after the November 10 deadline each year. DOL has information about the credit reduction states and loan balances on the UI Statistics page (http://workforcesecurity.doleta.gov/unemploy/finance.asp) of its Department of Labor website (http://www.dol.gov/).

Advice From the EDD

You are relieved of certain taxes and penalties if you failed to make a timely return or payment because you received written advice from the EDD. If you reasonably relied on the EDD's written advice, you are relieved of taxes, additions to tax and penalties when:

- You requested, in writing, advice from the EDD about if a particular activity or transaction is covered by the EDD's tax laws.
- You provided the specific facts and circumstances of the employment relationship, activity or transaction.
- The EDD responded in writing.
- You did not remit the taxes due because of the EDD's written advice.
- The EDD did not modify or rescind the advice to you.
- No law, regulation or material fact relating to that tax was subsequently changed.[41]

In addition, public employers and some nonprofit entities can choose to pay the UI tax or to reimburse the state for any benefits paid to their employees. These entities are not subject to the federal unemployment tax.[42]

Voluntary Contributions to the Unemployment Insurance Tax

If you are eligible, you can make a voluntary contribution to reduce your tax rate by one, two or three levels. You *cannot* make voluntary contributions if you have a negative reserve account balance, are a new employer, have an unpaid liability on September 30 of the previous year or if you are already assigned the lowest possible rate.

In February of each year, the EDD notifies eligible employers of the amounts they can pay to reduce their rate. You have until the last working day in March to make a voluntary contribution.

If you have an unpaid liability on September 30 and were not notified of the liability prior to September 1, or if your unpaid liability on September 30 is the subject of a timely petition for reassessment, you can make a voluntary contribution.

Voluntary contributions are not prepayments of any legally due taxes and are not deductible on any future tax return. A voluntary contribution is an additional UI payment whose sole purpose is to reduce your UI contribution rate. You must carefully determine if a voluntary contribution will reduce your overall UI costs. You cannot receive a refund of a voluntary contribution.

Record Keeping for Unemployment Insurance

You must keep payroll records for all employees for at least four years. Records must include:

- Monetary wages paid, the dates and amounts of payment and the period covered
- Each employee's name, Social Security number (SSN), date hired, date released, occupation and place of work
- The fair market value of in-kind wages paid
- Payments such as bonuses or gifts, the nature of the payments and the period of employment covered by each payment
- Amounts withheld from employee wages. Withholding deposits may be required.[43]

Required Unemployment Insurance Notices and Pamphlets

If you are covered by the state's unemployment and disability insurance programs, you must post *Form DE 1857A - Notice to Employees - Unemployment Insurance, State Disability Insurance and Paid Family Leave*. If you fall under only the UI program, post *Form DE 1857D - Notice to Employees - Unemployment Insurance Benefits*.[44]

When discharging, laying off or placing an employee on a leave of absence, you must provide that employee with a current EDD pamphlet *DE 2320 - For Your Benefit*. This pamphlet informs employees of their benefit rights under the UI program.

You must also provide written notice about the change in the employee's status. At minimum, this notice must include the following information:

- Employer's name
- Employee's name
- Employee's SSN
- If the action was a termination, a layoff, a leave of absence or a change in status from employee to independent contractor
- The action date[45]

You must give the employee the notice and pamphlet no later than the effective date of the action.[46] Failure to comply with these requirements constitutes a misdemeanor.[47]

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[43] UI Code sec. 1085
[44] 22 CCR 1089-1(c)
[45] 22 CCR 1089-1(d)(2)
[46] 22 CCR 1089-1(d)(1)
[47] UI Code sec. 1089

Notice to Employee as to Change in Relationship.

Obtaining Unemployment Insurance Forms

You can download UI forms and publications from the EDD's website at www.edd.ca.gov/Forms/.

You can find the required *Form DE 1857A - Notice to Employees - Unemployment Insurance, State Disability Insurance and Paid Family Leave* on the ***2016 California and Federal Employment Notices Poster***, which contains the 17 state and federal required posters, compiled by CalChamber. To order the ***2016 California and Federal Employment Notices Poster***, call (800) 331-8877, or visit our online store at store.calchamber.com.

Unemployment Insurance Penalties

Civil and criminal penalties may be assessed against employers and claimants who fail to meet certain UI responsibilities.

Failure to Provide Information to Employees

Failure to provide a *Form W-2* to employees can result in monetary fines. These fines vary depending on whether the failure to provide is intentional or not intentional. If the *Form W-2* is furnished to employees late, a fine may also result, unless reasonable cause exists for the lateness. The IRS assesses these penalties on employers.

Failure to Provide Information to the EDD

If you intentionally fail to register with the EDD as an employer, you are subject to a penalty of $100 per non-reported employee. This penalty applies only to the calendar quarter in which you had the highest number of employees.

You must file the *DE 9 - Quarterly Contribution Return and Report of Wages* with the EDD or be subject to penalties.

Failure to file a timely return will result in a penalty of 15 percent of the tax due, plus interest compounded daily. If the return is not filed within 60 days of the last timely date, an additional penalty of 15 percent will be charged on unpaid contributions due on the return.

In addition, a wage item penalty of $20 per unreported worker may be charged if the EDD does not receive your wage detail.

Unemployment Insurance Fraud

Any person who makes a claim for benefits using a false name, false SSN or other false identification is disqualified from eligibility for UI. It is a misdemeanor to use a false name, false SSN or other false identification to obtain, increase, reduce or defeat UI benefits.[48]

Employers who engage in money laundering to pay workers in cash and to evade paying employer taxes may be assessed a penalty of 100 percent of taxes due. Any individual, officer, major stockholder or person in charge of the affairs of a business entity is personally liable for the penalty. Money laundering under this law typically occurs when a contractor pays a subcontractor by check, ostensibly for contract services. The subcontractor cashes the check and then returns a portion of the cash to the contractor.

[illegible]

The contractor uses this cash to pay the workers under the table. The transactions result in no records of wage payments and no employer contributions or employee payroll deductions.

Any employer, employee, officer or agent of an employer can be subject to a penalty for willfully making a false statement, representation or failing to report a material fact concerning a termination. The penalty ranges from 2 to 10 times the weekly benefit amount of the claimant. Any of the parties presenting false information will be subject to the penalty, as will the employer.[49]

Making an Unemployment Insurance Claim

To be eligible for UI benefits, a claimant must:

- Make a claim for benefits in accordance with the regulations.[50]
- Be unemployed through no fault of his/her own.[51]
- Meet eligibility requirements for each week that he/she claims benefits.
- Have earned $1,300 in one quarter or must have earned high quarter wages of $900 and total base period earnings of 1.25 times that amount.[52]
- Be able to work and be available for work.[53]
- Be actively looking for work.[54]
- Have registered for work and conducted a search for suitable work.[55]

To learn more about when a claimant is not eligible for UI, see "Responding to Unemployment Insurance Claims" on page 417.

Part-Time Availability and Unemployment Insurance Benefits

Claimants may be eligible for UI benefits even though they are only available for part-time work.[56] A claimant who restricts his/her availability to part-time work may be eligible for benefits, if:

- The claim is based on part-time employment.
- The claimant is actively seeking and is willing to accept work under essentially the same conditions.
- The claimant imposes no other restrictions and is in a labor market in which a reasonable demand exists for the part-time services the claimant offers.

UI benefits are not denied solely on the basis of the applicant's student status if school attendance does not eliminate a substantial portion of the claimant's full-time availability. The claimant must impose no other restrictions on availability and be working in a labor market with a reasonable demand for part-time employment. If the claimant restricts availability to part-time due to school attendance, UI benefits are paid as they would be to any other part-time employee.[57]

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[49] UI Code sec. 1142
[50] UI Code sec. 1253
[51] UI Code sec. 100
[52] UI Code sec. 1281(a)(3)
[53] UI Code sec. 1253
[54] UI Code sec. 1253
[55] UI Code sec. 1253
[56] UI Code sec. 1253.8
[57] UI Code sec. 1253.9

Reduction in Hours

UI benefits may be payable when a full-time employee works less than full time if the weekly wage payable to the individual, when reduced by $25 or 25 percent of the wages payable (whichever is greater), do not exceed his/her weekly UI benefit amount.[58] The employee must be working fewer hours because of lack of work through no fault of his/her own.

You must prepare and give a *Form DE 2063 - Notice of Reduced Earnings* to each affected employee by the fifth day after the end of your payroll week. You must complete the *DE 2063* for the seven consecutive days that correspond to your payroll week. If you do not pay your employees weekly, you must issue a *DE 2063* for each calendar week defined by the EDD as beginning at 12:01 a.m. on Sunday and ending at 12:00 a.m. on Saturday.

If you have a reduction of force and know that there will be no work for an employee for more than two weeks, do not issue a *DE 2063*. Similarly, if you terminate an employee for any reason, do not issue a *DE 2063*. In these situations, instruct these employees to contact an EDD office at once.

Establishing Good Cause

An individual can receive UI benefits if he/she voluntarily left employment for good cause. Good cause occurs when a substantial motivating factor causes the claimant to leave work. The factor need not relate to work. It must be a real, substantial and compelling reason that would cause a reasonable person who wants to remain employed to leave work under the same circumstances.[59]

Depending on the circumstances, leaving work for good cause might include the following reasons:

- Going to school
- Change in travel time or distance
- Moving beyond reasonable commuting distance with a spouse or registered domestic partner
- Being required to care for a seriously ill child
- Leaving an employer who does not address serious harassment or safety issues
- Choosing to be laid off in place of an employee with less seniority, if a collective bargaining agreement allows this practice
- Protecting himself/herself or his/her family from domestic violence.

The following examples do not generally constitute good cause:

- Increased child care costs
- Moving beyond reasonable commuting distance with a significant other who is not one's spouse or registered domestic partner
- Looking for another job
- Change in job duties or demotion

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58. UI Code sec. 1252

59. UI Code sec. 1 [illegible]

Relocating With a Spouse or Domestic Partner

A person quits with good cause and is eligible for UI benefits if he/she leaves to accompany a spouse or registered domestic partner to a place from which it is impractical to commute and to which a job transfer is not available.[60]

California law defines "domestic partners" as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring" and who file a Declaration of Domestic Partnership with the Secretary of State.[61]

Protection From Domestic Violence

A change to UI law expanded the scope of good cause to include circumstances in which an employee leaves employment to protect his/her *family* or himself/herself from domestic violence. Prior law limited good cause to leaving employment to protect himself/herself or his/her *children*. This change brings California into compliance with federal eligibility requirements.

The employee is eligible for UI benefits if all other eligibility requirements are met. However, the UI benefits paid are not chargeable to your account.[62]

Leaving for a Substantially Better Job

UI benefits paid to an employee who leaves a job for a substantially better job and who later becomes eligible for UI will not be charged to the account of the first employer.[63] For example, if a former employee lost his/her new job or had his/her hours reduced, the UI benefits would not be charged to the first employer.

Unemployment Insurance Benefit Amounts

The maximum amount of state UI benefits during each benefit year is 26 times the weekly benefit amount or one-half of the total earnings in the base period, whichever is less. A benefit year is the 52-week period beginning on the date a new claim is filed.

Eligible individuals can receive a minimum of $40 to a maximum of $450 per week for up to 26 weeks, depending on past quarterly earnings. After eligibility is determined, claimants receive a benefit check every two weeks.

For more information, visit the EDD's website at www.edd.ca.gov/Unemployment/default.htm.

Unemployment Insurance Benefits Coverage Period

Benefits start with the effective date of the claim, which is the Sunday prior to the date an individual contacts the EDD to file a claim. All claims have a one-week waiting period. The one-week waiting period is not a paid week and does not begin until the claim is filed.[64]

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[60] UI Code sec. 1030(a)(4)

[61] Family Code sec. 297

[62] UI Code secs. 1030, 1032, 1256

[63] UI Code sec. 1032

[64] UI Code sec. 1253(d)

The Unemployment Insurance Base Period

The EDD calculates UI benefits using a person's earnings during a specific 12-month period, called a "base period." The base period is relative to the beginning date of a new claim. The base period begins approximately 15 to 17 months prior to the date the claim is filed. The amount paid each week is calculated based on the calendar quarter with the highest earnings during the base period.

The base period is determined as follows:[65]

For Claims Beginning In:	**Base Period is 12 Months Ending the Previous:**
January, February and March	September 30
April, May and June	December 31
July, August and September	March 31
October, November and December	June 30

Taxes on Unemployment Insurance Benefits

The Federal Tax Reform Act of 1986 provides for federal taxation on UI benefits. Claimants can voluntarily request that the EDD withhold 15 percent of weekly benefits for federal taxation of UI benefits.

Responding to Unemployment Insurance Claims

If you receive a *Notice of Unemployment Insurance Claim Filed* from the EDD, there are several steps to follow.

You should respond within 10 days of the mail date at the top of the notice. Failure to respond in a timely manner waives your right to appeal any determination as to eligibility. This is especially important if you believe the claimant is ineligible due to a disqualifying event, as discussed below.[66] This is the first opportunity to provide eligibility information.

A timely response guarantees:

- A written *Notice of Determination/Ruling* from the EDD
- The employer's rights to appeal the EDD's determination

The *Notice of Determination/Ruling* advises you of the EDD's decision regarding the claimant's eligibility. This document provides a reason for the decision, charges to the employer reserve account, and appeal rights.

The EDD can deny you reimbursement for any overpayments made from your reserve account, if the overpayment resulted from your failure to respond to or provide adequate information to the EDD.

If you disagree with EDD's eligibility determination, file your appeal in writing within 30 days of the mail date at the top of the *Notice of Determination/Ruling*.

If you disagree with the EDD's final determination, you have the right to protest the claim by filing an appeal. An administrative law judge (ALJ) will hear the protest. If the ALJ allows the claimant benefits but you still believe the decision is incorrect, you can appeal to the California Unemployment Insurance Appeals Board. You can take further appeals to the courts, starting with the California superior courts.[67]

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[65] UI Code sec. 1275

[66] UI Code sec. 1327

Ensure that any reason given for the separation from employment is accurate, well-documented and consistently explained. The reason you provide to the EDD should be consistent with the reason you provided to the employee and any other outside agency seeking information.

For more information on responding to UI claim notices, visit the EDD's website at www.edd.ca.gov/.

Ineligibility for UI Benefits

A claimant is considered ineligible for UI benefits if he/she is out of work for one of the following reasons:

- Voluntary quit without good cause
- Termination for misconduct
- Refusal to perform suitable work

Discharge for Misconduct

Unemployment Insurance Code section 1256 disqualifies an employee from receiving unemployment compensation benefits if discharged for misconduct. Misconduct under this section of the code has been defined as "willful or wanton disregard of an employer's interests or such carelessness or negligence as to manifest equal culpability."[68]

Mere inefficiency, unsatisfactory conduct, failure in good performance due to inability or incapacity, inadvertent errors or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not deemed "misconduct."[69] Also, an employee's inability to perform essential job duties generally does not meet the definition of misconduct.

Firing an employee for violating company policy does not automatically bar the employee from receiving unemployment insurance. Again, the actual misconduct at issue will need to be examined to see if it meets the above criteria.

An employee's termination for misconduct will not necessarily prevent the employee from receiving UI benefits; the underlying misconduct will be at issue.

The California Supreme Court ruled that an employee's refusal to sign a disciplinary notice, acknowledging receipt of the notice, was not misconduct. It was, according to the court, "at most, a good faith error in judgment" that did not disqualify him from receiving unemployment insurance benefits.[70]

The case involved a driver who worked for Paratransit, a company which provides transportation services for the elderly. Under the terms of a collective bargaining agreement (CBA) between Paratransit and the union representing the drivers, all disciplinary notices are put in writing. The CBA required drivers to sign all disciplinary notices indicating receipt, but provided that a signature was not an admission of fault or the truth of any statement in the notice.

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[67] [illegible]

[68] [illegible]

[69] [illegible]

[70] [illegible]*sit, Inc. v. Unemployment Insurance Appeals Board*, 59 Cal.4th 551 (2014)

A passenger complained that the driver harassed her. HR investigated, determined the misconduct occurred and met with the driver to give him a disciplinary notice. Below the signature line on the notice appeared a note stating: "Employee Signature as to Receipt."

The driver refused to sign the document because he thought he was admitting the truth of what was in it. He also thought he should have a union representative present.

Paratransit informed the driver that his signature meant only that he received the document, nothing more. Paratransit also told him that refusing to sign was a violation of the CBA, would be treated as insubordination, and he would be terminated. The driver left the meeting without signing the document, was fired, and then filed for UI benefits.

The employer argued that the driver's misconduct barred him from receiving UI benefits. The driver, on the other hand, claimed he was confused and tired during the meeting over the disciplinary notice. He refused to sign because his union president had told him never to sign anything without a union representative present. He also thought he had a right to have a union representative present, and thought the meeting would be rescheduled. Further, the driver had no prior incidents of insubordination.

The California Supreme Court held that the driver made a mistake of judgment and should not be barred from receiving UI benefits. The court held that there was no dispute over whether the employer was within its rights to fire the employee for insubordination, acknowledging that the employer could justifiably terminate the driver. Instead, the sole question was whether the employee's refusal to sign a disciplinary notice amounted to misconduct barring him from receiving UI benefits after termination. The court held that it did not amount to such misconduct.

The unanimous *Paratransit* court held that:

- "[A]n employee's unequivocal refusal to comply with the employer's rule, without more, is not misconduct within the meaning of section 1256. As in all cases of misconduct, the employee's insubordination must be marked by fault. Hence, violating an employer's reasonable order because of a good faith error in judgment does not disqualify an employee from receiving benefits [Citations omitted]."
- The court felt that the driver did not refuse to sign the notice merely to be difficult. Instead, according to the court, the disciplinary notice itself was unclear. The court observed that "the notice contained no explicit admissions disclaimer and did not specify that signature was *solely* for receipt purposes. ... [T]he disciplinary notice was not so clear on the point that [the driver's] excuse for not signing it smacked of wrongful intent or evil design [emphasis added]."

The *Paratransit* decision makes it clear: An employee's termination for misconduct will not necessarily prevent the employee from receiving UI benefits; the underlying misconduct will be at issue.

In another case, a California court allowed an employee who was fired for attempting to buy shoes for a friend at the company's expense. According to the court, whether termination for "misconduct" will bar UI benefits depends on the reason the employee was fired.[71]

In this case, the court found that there was no evidence of willful or intentional disobedience. The employee was, "[a]t most ... guilty of a good faith error in judgment. At the least, Robles misunderstood the limits of what he could do with the safety shoe allowance, which he was entitled to as a benefit of employment."

The court also emphasized that the law presumes that an employee was not discharged for misconduct. It is up to the employer to submit evidence that misconduct occurred. In this case, the employer did not oppose benefits, did not speak with EDD investigators and did not submit any evidence of the employee's misconduct.

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[71] *Robles v. Employment Development Department*, 207 Cal.App.4th 1029 (2012)

The court's decision may very well have been different if the employer had provided evidence of the employee's misconduct.

Consult with legal counsel if you have any questions regarding claimant eligibility or how to respond to a UI claim.

Each employee's termination will need to be examined on a case-by-case basis considering all the circumstances. Some questions to ask are if there was:

- Willful misconduct?
- Disregard of the employer's interests?
- A pattern of refusing to follow orders?

Or, on the other hand, was it:

- Mere inefficiency?
- A good faith error in judgment?
- An isolated incident?

Combining Unemployment Insurance With Other Benefits

Under limited circumstances, if a claimant receives other payments, his/her UI benefits may be affected.

Vacation Pay and Unemployment Insurance Benefits

Vacation pay for a fixed layoff, such as closing for a week at Christmas, will affect UI benefits. If the employees have a definite date to return to work after the Christmas vacation, the vacation pay will be deducted from their weekly UI benefits. A fixed layoff occurs when an employer provides a date on which the affected employees must return to work.

Worker Adjustment and Retraining Notification Act (WARN) Act Payments

If you fail to give notice of a mass layoff or plant closing, you may be required to pay employees 60 days' wages as a penalty under the federal Worker Adjustment and Retraining Notification Act (WARN). For more information, see Chapter 30, "Layoffs and Plant Closings." If a person receives payments due to his/her employer violating the WARN Act, these payments do not affect his/her eligibility for UI benefits.[72]

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[72] UI Code sec. 1265.1

Further Information

Determining if an employee is eligible for UI can be quite complex. The EDD's website includes definitions of common terms, detailed information about eligibility issues and example situations. Visit the EDD's website at www.edd.ca.gov/uibdg/.

Work Sharing Program

The Work Sharing Program[73] was created to help you avoid mass layoffs by sharing the available work among the employees when there is a temporary decline in business.

The Work Sharing Program offers three advantages:

- It allows you to continue providing some work to all employees, rather than laying off significant groups of employees.
- It allows you to maintain a relationship with a trained workforce so you are ready when business returns to normal.
- It costs less than completely laying off workforce groups, because the employees involved in the work sharing plan receive lower amounts in benefits. However, your costs are the same as any employer with an employment tax rating.

Requirements for certain work sharing plans were changed as a result of legislation effective on July 1, 2014. Work sharing plans effective on or after July 6, 2014, must meet additional requirements. Work sharing plans effective on or prior to July 5, 2014, will continue under the law as it existed prior to the legislation that took effect on July 1, 2014.

The EDD's director must still approve work sharing plans. For more information about the work sharing program, visit EDD's work sharing webpage at http://www.edd.ca.gov/Unemployment/Work_Sharing_Program.htm.

If you are interested in participating in the Work Sharing Program, contact:

EDD Special Claims Office
P.O. Box 419076
Rancho Cordova, CA 95741-9076
(916) 464-3343
Fax: (916) 464-3342

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[73] UI Code sec. 1279.5

Health and Retirement Benefits

This section discusses several issues relative to employee health and retirement benefits. These include the federal Affordable Care Act (ACA); the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA); the companion state law, Cal-COBRA; and the Employee Retirement Income Security Act of 1974 (ERISA).

The section on the ACA explains certain key health care reforms implemented by that law.

The discussion of COBRA and Cal-COBRA explains covered plans, covered employers (organization size and employee count), denying coverage, qualified beneficiaries, qualifying events, length of coverage, terminating coverage and conversion plans. The ***Digest*** provides model notices for both COBRA and Cal-COBRA. The COBRA notices and explanations satisfy federal regulations.

The ***Digest*** includes information on California's Health Insurance Premium Payment Program (HIPP), not to be confused with HIPAA. HIPP provides assistance to certain individuals to permit them to pay for COBRA coverage.

Our brief overview of ERISA identifies:

- Which plans and people are covered
- Employer's fiduciary requirements
- Reporting and disclosure requirements
- Nondiscrimination laws

Federal Health Care Reform Overview

The Patient Protection and Affordable Care Act, as amended by the Health Care and Education Affordability Reconciliation Act (together the Act or ACA), was signed into law by President Obama in 2010. The ACA includes the most sweeping changes to the health care laws in generations and will significantly affect not only health insurers, but also employers who sponsor group health plans and employees who participate in them.

The ACA was designed to make major expansions to health care coverage for U.S. citizens and legal residents. The ACA mandates that most citizens and legal residents obtain health care coverage.

In addition, the ACA mandates that employers of 50 or more full-time employees (including full-time equivalent (FTE) employees) offer health care coverage to full-time employees or pay a penalty. Although the ACA's employer mandate was set to take effect in 2014, the federal government postponed the requirement's effective dates until 2015, or 2016 depending on employer size:

- For employers with **100 or more full-time employees** (including full-time equivalents), the employer mandate took effect January 1, 2015.
- For employers with **50 to 99 full-time employees** (including full-time equivalents), the employer mandate is effective January 1, 2016.

The final regulations establish a "full-time" employee as someone who works an average of 30 or more hours per week.

See the Groom Law Group's website, at http://www.groom.com/media/publication/1383_4980H_Waiting_Period_Final_Regulations.pdf, for additional information.

The so-called "Cadillac plan" excise tax does not take effect until 2018.

You should analyze how the ACA's requirements will impact your plans and determine what plan document and administrative changes are necessary to bring your plans into compliance.

Please note, this section provides a basic summary of certain key health care reforms that you should know about. For updates and a more detailed discussion of regulatory guidance under the ACA, please visit the Groom Law Group's website at http://www.groom.com/Health_Care_Reform.

A benefits policy is available as part of CalChamber's ***Employee Handbook Creator***. Visit store.calchamber.com to find out more about how to easily create your employee handbook.

Acknowledgments

CalChamber thanks the Groom Law Group for preparing the section on the provisions of the federal ACA. Groom Law Group, Chartered, is a Washington, D.C.-based law firm of more than 70 attorneys that focuses exclusively on employee benefits issues.

Brigen Winters is a principal at the firm and counsels plan sponsors, insurers and other financial institutions on health and welfare, executive compensation and tax-qualified retirement plans. He also advises clients on legislative and regulatory matters, with a particular focus on the new health reform legislation.

Tamara Killion is a principal at the firm and works with clients on issues related to their employee benefit plans, including plan design, claims administration, compliance with ERISA's fiduciary responsibility provisions, and HIPAA requirements. Ms. Killion is actively helping clients implement health care reform.

More information on the firm and its attorneys can be found at www.groom.com.

Employer Mandate

The ACA's employer mandate requires all employers with more than 50 employees (including full-time equivalent (FTE) employees) to provide health insurance for their full-time employees, or pay a per-month "employer shared responsibility payment" on their federal tax return. The final regulations establish a "full-time" employee as someone who works an average of 30 or more hours per week.

In 2014, the Department of Treasury and the Internal Revenue Service (IRS) issued final regulations that postponed the employer mandate until January 1, 2015, for employers with 100 or more full-time employees (including full-time equivalents), and January 1, 2016, for employers with 50 to 99 full-time employees (including full-time equivalents).

As of January 1, 2016, all employers with 50 or more full-time employees (including full-time equivalents) will be subject to the employer mandate.

See the Groom website, at http://www.groom.com/media/publication/1383_4980H_Waiting_Period_Final_Regulations.pdf, for additional information.

Employer Shared Responsibility Mandate

The Act imposes penalties on certain employers that meet both of the following criteria:

- Do not offer minimum essential coverage under an eligible employer-sponsored plan or offer inadequate or unaffordable minimum essential coverage under such a plan
- Have at least one full-time employee who qualifies for a federal tax credit for health care coverage through an exchange

Minimum essential coverage must be under an eligible employer-sponsored plan, which means, with respect to an employee:

- Group health insurance coverage offered by, or on behalf of, an employer to an employee that is:
  - A governmental plan
  - Any other plan or coverage offered in the small or large group market within a state
  - A grandfathered health plan offered in the group market
- Or a self-insured group health plan under which coverage is offered by, or on behalf of, an employer to the employee[1]

The penalty generally applies to employers with an average of 50 or more full-time employees including, for this purpose, full-time equivalent employees. The Act generally defines full-time employees as those who work an average of 30 or more hours per week in any month. Part-time employees are converted into full-time equivalent employees for purposes of the 50-employee threshold test by dividing the number of hours per month that they work by 120.

The controlled group employer aggregation rules (Internal Revenue Code sections under section 414(b), (c), (m), or (o)) also apply for purposes of applying the 50-employee threshold. All employees of a controlled group of entities under section 414(b) or (c), an affiliated service group under section 414(m), or an entity in an arrangement described under section 414(o), are taken into account in determining whether the members of the controlled group or affiliated service group are an "applicable large employer" subject to the employer mandate.

The penalty is calculated on a monthly basis and varies depending on whether an employer does or does not offer minimum essential coverage. If you do not offer minimum essential coverage under an eligible employer-sponsored plan to full-time employees and have at least one full-time employee who obtains a federal tax credit for coverage through an exchange, you are subject to an annual penalty of $2,000 for each full-time employee, after subtracting the first 30 employees.

If you offer minimum essential coverage under an eligible employer-sponsored plan to full-time employees, but have at least one full-time employee obtain a federal tax credit for coverage through an exchange (e.g., because your coverage does not provide a 60 percent minimum value or is unaffordable under the 9.5 percent of income test), you are subject to an annual penalty equal to the lesser of:

- $3,000 for each full-time employee receiving a federal tax credit
- $2,000 for each full-time employee, after subtracting the first 30 employees (80 employees under transition relief in the final regulations for 2015)

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[1] Treas. Reg. sec. 1.5000A-2

Who Must Be Covered?

An employer covered by the Act must offer coverage to "substantially all" of its full-time employees and their dependents. The final regulations define "substantially all" as offering coverage to at least 95 percent of an employer's full-time employees (and their dependents).

An exception existed for those employers that were required to comply in 2015 (those with 100 or more full-time employees, including full-time equivalents). Specifically, the final regulations offered transitional relief by providing that for each calendar month during 2015 (and, for fiscal year plans, any month during the 2015 plan year that falls in 2016), the 95 percent requirement is reduced to 70 percent.

This is only for 2015; by 2016, covered employers must meet the 95 percent threshold or face a penalty for non-compliance.

Automatic Enrollment

New 2016

In late 2015, Congress passed legislation to repeal the Act's automatic enrollment provision, and the president signed the legislation into law.

Individual Mandate

In 2014, the Act imposed an individual coverage mandate, under which individuals are required to obtain minimum essential coverage or be subject to a potential penalty.

The Act defines the term "minimum essential coverage" broadly to include certain government-sponsored programs (like Medicare and Medicaid), employer-sponsored plans, individual health plans, grandfathered health plans, as well as other coverage recognized by the Department of Health and Human Services (HHS).

Generally, an individual failing to maintain minimum essential coverage will be subject to a penalty, calculated on a monthly basis, based on 1/12th of the greater of:

- For 2014, $95 per uninsured person or 1 percent of household income over the filing threshold
- For 2015, $325 per uninsured person or 2 percent of household income over the filing threshold
- For 2016 and beyond, $695 per uninsured person or 2.5 percent of household income over the filing threshold

There is a cap on the flat dollar amount (but not the percentage of income test) of 300 percent of the per person amount, and the overall penalty is capped at the national average premium of a bronze level plan (i.e., one providing 60 percent of the full actuarial value of the benefits provided under the plan) purchased through the exchange. The applicable per person penalty is one-half of the amounts listed above for individuals under 18. Individuals are generally allowed one penalty waiver per year for a gap in coverage that does not exceed three consecutive months.

Special allowances are made for certain individuals, including those who are unable to afford health care coverage. A penalty will not be imposed on an individual for any month in which his/her insurance premiums exceed 8 percent of his/her household income. In addition, penalties will not be assessed on taxpayers whose income is below the filing threshold set out in section 6012(a)(1) of the Internal Revenue Code.

Final regulations on the individual mandate were published on August 30, 2013. They are available on the Government Printing Office website at http://www.gpo.gov/fdsys/pkg/FR-2013-08-30/pdf/2013-21157.pdf.

Refundable Health Premium Tax Credit

The Act also provides a refundable health premium tax credit to eligible individuals covered by a qualified health plan through an exchange that may be applied toward the cost of the health plan coverage. Cost-sharing subsidies also are available to reduce out-of-pocket costs of eligible individuals in silver plan coverage through an exchange.

In general, the refundable health premium tax credit is available to individuals with household incomes between 100 percent and 400 percent of the federal poverty level (FPL) who are not otherwise eligible for minimal essential coverage, such as coverage through an eligible employer-sponsored plan. The cost-sharing reductions are generally available to individuals with household income between 100 percent and 250 percent of the federal poverty level, who enroll in silver level coverage through an exchange, and are eligible for the health premium tax credit.

Employees offered minimum essential coverage by an employer where the plan's share of the costs of benefits provided is less than a 60 percent minimum value or the premium for self-only coverage exceeds 9.5 percent of the employee's household income are not considered to be eligible for minimum essential coverage and may be eligible for the credit if household income is within 100 to 400 percent of the FPL and they meet other eligibility requirements.

Final regulations on the health premium tax credit and cost-sharing reductions were published in 2012. They are available on the Government Printing Office website at http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-12421.pdf.

Health Insurance Exchanges

By 2014, each state (or, if the state did not do so, the federal government) was required to establish one or more Exchanges ("Health Insurance Marketplaces") through which small employers and individuals can buy health insurance.

Generally, U.S. residents (other than incarcerated individuals) are able to purchase individual health insurance through the exchange in the state in which they reside if their state developed its own Exchange, or though the federal government's Exchange.

In 2014 through 2016, only small employers will be allowed to purchase group health coverage through an exchange. Generally, a small employer is defined as one with 50 or fewer employees, although a state can elect to use a higher threshold of up to 100 employees as the cut off for small group coverage instead. Beginning in 2017, states can allow large employers to purchase group health coverage through an exchange.

The Act generally requires each state to establish an exchange for small employers and one for individuals. However, a state can elect to combine them into one exchange, as is the case in California.

California Marketplace (Covered California)

California was one of many states that enacted legislation establishing its own insurance marketplace, Covered California. Covered California is a state run entity that permits individuals and small employers to purchase health insurance coverage. Covered California offers medical coverage to individuals, families and small employer plans. California residents and small businesses are able to purchase health insurance through Covered California.

For more information, visit Covered California at www.coveredca.com.

Covered California's Small Business Program

Covered California for Small Business is a marketplace for small businesses, through which small employers are able to offer health insurance to their eligible employees.

Unlike the individual marketplace, there is no designated open-enrollment period for small businesses; employers may enroll at any time during the year. In 2015, only employers with 50 or fewer eligible employees were able to offer coverage through Covered California for Small Business.

New 2016

Starting on January 1, 2016, companies with 100 or fewer employees are eligible to provide coverage through this program.

For more information, visit Covered California for Small Business at www.coveredca.com/forsmallbusiness/.

Employers With Fewer Than 25 Employees

The Act includes a new tax credit for small employers that purchase health insurance for their employees. In general, to be eligible for the tax credit the following conditions must be met:

- The employer must have fewer than 25 full-time equivalent employees.
- The employees' average annual wages must be under $50,000.
- The employer must contribute a uniform percentage of at least 50 percent of the health care premium cost.
- The maximum tax credit is available to employers with 10 or fewer full-time equivalent employees and average annual wages of $25,000 or less. It then phases out quickly for employers with between 10 and 25 employees and/or with average annual wages between $25,000 and $50,000.

The credit is available only for qualified health plan coverage purchased through a public exchange or "marketplace," such as Covered California (www.coveredca.com). You can only receive the credit for a maximum period of two consecutive years.

Reporting Requirements

Beginning in 2016 (for information on 2015), employers sponsoring self-funded plans and insurers will be required to report information about minimum essential coverage (MEC) provided during the prior year to all enrollees, including Taxpayer Identification Numbers of all covered individuals and the specific dates that such individuals had such coverage.

In addition, employers with 50 or more full-time employees and full-time equivalent employees (and thus subject to the employer mandate) will be required to report information about health coverage offered during the prior year to full-time employees, including information about the lowest cost option offered and whether the minimum value requirements were satisfied. In March 2014, the IRS published long-awaited final regulations outlining these two new reporting requirements.

See the Groom website at http://www.groom.com/media/publication/1450_IRS_Final_Regulations_Impose_Complex_Information_Reporting_Requirements.pdf for additional information.

The IRS released final forms and instructions that will be used by employers, insurance issuers, and other entities for this federal tax information reporting for 2015 (with forms due in early 2016):

- Form 1094-B is the transmittal form to be used for MEC reporting, and Form 1095-B is the reporting form for MEC reporting
- Form 1094-C is the transmittal form to be used for employer mandate reporting, and Form 1095-C is the reporting form for employer mandate reporting

The Forms and Instructions for 2015 reporting can be found on the IRS website at:

- https://www.irs.gov/pub/irs-prior/i109495c--2015.pdf
- https://www.irs.gov/uac/About-Form-1094-C
- https://www.irs.gov/uac/About-Form-1095-C
- https://www.irs.gov/pub/irs-pdf/i109495b.pdf
- https://www.irs.gov/uac/About-Form-1095-B

Employers that are subject to the employer mandate and that sponsor self-insured group health plans will provide MEC reporting on Forms 1094-C and 1095-B (and will not file Form 1094-B and Form 1095-B with respect to the coverage provided to employees).

For more information about the ACA's tax provisions, see the IRS' Large Employer Information Center at www.irs.gov/Affordable-Care-Act/Employers/Affordable-Care-Act-Tax-Provisions-for-Large-Employers.

See Groom's website at http://www.groom.com/media/publication/1465_IRS_Health_Coverage_Reporting_Instructions_Leave_Many_Questions_Unanswered.pdf for additional information on previous guidance and instructions on the reporting requirements.

Form W-2 Reporting

Under the Act, employers are required to include the aggregate cost of employer-sponsored health coverage on an employee's *Form W-2*.

The IRS issued guidance in January 2012 (IRS Notice 2012-9) to inform employers that, beginning with 2012 *Form W-2*s (furnished to participants in January 2013), most employers with more than 250 employees are required to report the cost of employer-sponsored health coverage. This cost is reported on Box 12 of the *Form W-2*, using code "DD." Small employers that file fewer than 250 *Form W-2*s for the prior year generally are exempt from the reporting requirement until further guidance is issued.

The IRS guidance clarifies that employers are not required to include the cost of coverage under an employee assistance program, wellness program, or on-site medical clinic in the reportable amount if the employer does not charge a premium for the coverage. Dental and vision coverage is also exempt if either:

- The coverage is provided through a separate insurance policy or contract.
- Participants have the right to not elect dental or vision coverage and if they do elect such coverage they must pay an additional contribution.

For a more detailed discussion on IRS Notice 2012-9, please visit Groom's website at http://www.groom.com/media/publication/1099_Additional_Interim_Guidance_Issued_on_Form_W-2_Reporting_for_Health_Care_Costs.pdf.

Employee Notice Requirements

Employers covered by the Fair Labor Standards Act (FLSA) must provide a notice of health care coverage options to each employee, regardless of plan enrollment status (if applicable) or of part-time or full-time status.[2] Current employees must have received the notice by October 1, 2013. In addition, employers must provide the notice to each new employee at the time that he/she is hired.

The DOL stated that although employers should provide the notice of coverage options, there is no fine or penalty for failure to do so.

The notice should inform employees of:

- The existence of the Health Insurance Marketplace (Marketplace), also called an exchange;
- A description of services;
- How to contact the Marketplace;
- The fact that, depending on their income and what coverage may be offered by the employer, they may be able to get lower cost private insurance in the Marketplace;
- The fact that if they buy insurance through the Marketplace, they may lose the employer contribution (if any) to their health benefits; and
- Additional required information.

The notice also provides information about the employer's health plan, or lack thereof.

The U.S. Department Of Labor (DOL) has issued temporary guidance on what the DOL will consider as compliance with the notice requirement. You can find this information at http://www.dol.gov/ebsa/newsroom/tr13-02.html.

Model Notice

The DOL also created a model notice. There are two versions: One version for employers who do not offer a health plan and a second version for covered employers who do offer a health plan for some or all employees.

New Health Insurance Marketplace Coverage Options and Your Health Coverage (for Employers that Do Not Offer a Health Plan)

New Health Insurance Marketplace Coverage Options and Your Health Coverage (for Employers that Do Not Offer a Health Plan) - Spanish

New Health Insurance Marketplace Coverage Options and Your Health Coverage (for Employers that Offer a Health Plan)

New Health Insurance Marketplace Coverage Options and Your Health Coverage (for Employers that Offer a Health Plan) - Spanish

Employers should also keep in mind that:

- The exchange notice requires employer input.
- The model notices can be modified as long as it provides the required content. Refer to DOL's temporary guidance document for what needs to be included and consult with your benefits expert before making changes.
- The notice must be provided to all employees: full-time and part-time.

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[2] [illegible]

- Some of the information on the notice is optional. Your company may want to include the optional information if it is helpful to employees and will give them a better understanding of the exchange and of any company-offered coverage.

Some employers choose to provide additional information to employees along with the notice. For instance, some employers choose to provide additional general information regarding the ACA's implementation or to explain the ACA's actual effect on their employees. Again, consult with your current benefits administrator or other benefits expert as to any additional information you wish to provide.

Employers Covered by the Notice Requirement

The notice of coverage options requirement applies to all employers covered by the FLSA. Generally, the FLSA covers employers that employ one or more employees and who are engaged in, or produce goods for, interstate commerce. For most firms, a test of not less than $500,000 in annual dollar volume of business applies. The FLSA automatically covers some specific entities, including federal, state and local government agencies, hospitals and most schools.

The DOL provides a tool to help companies determine the applicability of the FLSA. Employers can also use the *FLSA Worksheet - Determining Coverage.*

FLSA Worksheet - Determining Coverage

Specific questions about whether your organization is covered by the notice requirement should be directed to your benefits administrator or other benefits expert.

Delivery of Notice

You must provide the notice in writing, and in a way that is understood by the average employee. While the guidance does not specifically address providing the notice to non-English-speaking employees, it does state that the notice must be provided "in writing in a manner calculated to be understood by the average employee." If you have a substantial percentage of employees who do not read English, it is generally a good idea to provide it to them in the language they use. DOL has created Spanish versions of the model notices.

The notice must be provided free of charge. Employers are not required to provide a separate notice to dependents or other individuals who are, or may become, eligible for coverage under the plan but who are not employees.

The notice can be provided by first-class mail or electronically. Electronic delivery of the notice must meet the requirements of the DOL's electronic disclosure safe harbor. Generally:

- The administrator of the employee benefit plan must ensure that the system used to furnish the documents results in actual receipt of transmitted information (such as using a return-receipt or bounce back feature) and protects confidentiality of personal information relating to the individual's account or benefits.
- Electronic notification can be provided only if the participant has regular access to the employer's electronic information system as part of his/her job duties, or has provided affirmative written consent to receive an electronic distribution.

This is just a general overview of the electronic notice requirements. More information about these requirements can be found by reading the existing regulation 29 CFR 2520.104vb-1(c) at http://www.law.cornell.edu/cfr/text/29/2520.104b-1. Questions should also be directed to your benefits administrator or benefits expert.

Other ACA Requirements

This section lists various requirements under the ACA.

Grandfathered Plans

Grandfathered plans are exempt from some — but not all — of the new plan design mandates in the Act. Generally, grandfathered plans are exempt from requirements related to preventive care, internal and external review, nondiscrimination rules about the coverage of highly compensated individuals, choice of providers, emergency care, clinical trials, cost sharing and deductible limits, guaranteed issue and renewal and insurance rating restrictions.

To be a grandfathered plan, a group health plan must have had at least one individual enrolled in coverage on March 23, 2010 (the date of enactment of the Act), have continuously covered someone since March 23, 2010 (even if not the same individuals), and satisfy certain other requirements.

In 2010, the DOL, the HHS and Internal Revenue Service (IRS) (collectively, the "agencies") jointly released an Interim Final Rule on the grandfathering rules in the Act. The rule addresses what changes an insurer or plan sponsor can make to health insurance coverage or a group health plan without loss of its grandfather status.

The agencies issued a revised regulation that clarified the circumstances in which a plan sponsor can switch insurers without a group health plan losing its grandfathered status. The following chart summarizes some of the key permissible and impermissible changes:

Permissible Changes (No Loss of Grandfathered Status)	Impermissible Changes (Will Cause Loss of Grandfathered Status)
• Changes to policy or plan's premium. • Changes required to comply with federal or state law. • Changes to voluntarily comply with provisions of the Act or to increase benefits. • Changes to a plan's third-party administrator. • Changes in insurers (in certain circumstances).	• Elimination of a particular benefit. • Increase in co-insurance. • Increase in deductible or out-of-pocket maximum by more than medical inflation plus 15 percent, from 3/23/10. • Increase in co-payment by more than greater of (i) medical inflation plus $5 or (ii) medical inflation plus 15 percent, from 3/23/10. • Decrease in employer contribution by more than 5 percent below the contribution rate in effect on 3/23/10. • Certain changes in annual limits (depends on if the policy or plan imposed an overall annual or lifetime limit).

Grandfathered plans are not, however, exempt from certain other plan design mandates, including requirements related to restrictions on annual and lifetime limits, dependent coverage of children to age 26, rescissions, pre-existing condition exclusions and waiting periods. In addition, both grandfathered and non-grandfathered plans are covered by other requirements such as the employer play or pay mandates and various tax provisions. For a more detailed summary of changes affecting grandfathered and non-grandfathered plans, see "Plan Design Mandates" on page 433.

Plan Design Mandates

Grandfathered and non-grandfathered plans are required to comply with certain plan design mandates. Under the Act, both grandfathered and non-grandfathered group health plans generally are not permitted to:

- Impose any lifetime dollar limits on essential health benefits
- Impose any annual dollar limits on essential health benefits
- Rescind coverage unless there was fraud or intentional misrepresentation by the enrollee
- Deny coverage to adult children up to age 26, if the plan provides dependent coverage for children (except to the extent the plan is grandfathered and the child is eligible for other employer-provided coverage other than through a parent's employer)
- Impose pre-existing condition exclusions
- Impose waiting periods for over 90 days

In addition, non-grandfathered group health plans are covered by certain additional plan design mandates. For example, insured group health plans are prohibited from discriminating in favor of highly compensated individuals under requirements (to be provided in future regulations) similar to those set forth in section 105(h)(2) of the Internal Revenue Code. Such plans also are required to:

- Allow individuals to choose a pediatrician for their child's primary care physician
- Allow females to choose a gynecologist or obstetrician without having to obtain a referral
- Allow emergency room services without any pre-authorization and treating them as in-network
- Require an internal appeals and external review process for participant claims
- Require certain preventative care services and benefits and immunizations to be covered without cost sharing

Under the ACA, the maximum eligibility waiting period for group health plan participation is no more than 90 days. Under California law, employer-imposed waiting period limitations for health care coverage are governed by the 90-day period authorized under the ACA.

In addition, non-grandfathered group health plans are covered by the following additional plan design mandates:

- For insured coverage:
  - Rating limitations in the individual and small group markets (e.g., rating based on; tobacco use 1.5:1, age 3:1, rating area and coverage for individual versus family). Note that California does not permit rating based on tobacco use.
  - Guaranteed issue
  - Guaranteed renewability
  - Cover essential health benefits in the small group markets
- For insured and self-funded coverage:
  - No discrimination on health care providers acting within the scope of their license
  - Cost-sharing and deductible limits
  - Coverage for the costs associated with certain clinical trials without additional conditions

Plans also are permitted to use discounts of up to 30 percent (for non-tobacco wellness programs, plus an additional 20 percent (for a total of 50 percent) for tobacco wellness programs) of the cost of an employee's coverage (currently limited to 20 percent) as an incentive for employees to participate in wellness programs.

The Departments of Health and Human Services, Labor, and Treasury issued final rules on "Incentives for Nondiscriminatory Wellness Programs in Group Health Plans." You can find a summary of the final rules, including a step-by-step approach for group health plans to evaluate their wellness programs under the new final HIPAA wellness regulations, on the Groom website at http://www.groom.com/media/publication/1259_Agencies_Issue_Final_HIPAA_Wellness_Program_Rules_under_ACA_Final.pdf.

Over-the-Counter (OTC) Drugs and Flexible Spending Accounts

The definition of qualified medical expenses for reimbursements from health flexible spending accounts (health FSAs), health reimbursement accounts (HRAs) and other employer-provided health coverage, as well as distributions from health savings accounts (HSAs), exclude over-the-counter (OTC) drugs unless the drug is prescribed or is insulin. Therefore, participants cannot use amounts in a health FSA or HRA to pay for OTC drugs unless the OTC drugs are prescribed. In addition, the use of FSA and HRA debit cards for OTC drugs is significantly restricted.

HSA Distributions for Non-Medical Purposes

The additional tax on distributions from an HSA that are not used for qualified medical expenses is now 20 percent of the distributed amount.

FSA Contribution Limit and Carryovers

New 2016

Employee salary reduction contributions to a health FSA were limited to $2,550 per year for 2015. That amount will remain unchanged for 2016.

The IRS now allows employers to amend their plans to permit employees to carry over up to $500 of the previous plan year's unused FSA contributions into the next plan year. Under the IRS guidance, a plan that adopts the carryover provision may not also provide a grace period for the FSA.

For additional information, see the Groom website at http://www.groom.com/media/publication/1312_Unused_Health_FSA_Balances.pdf.

Patient-Centered Outcomes Research Institute (PCORI) Fee

Beginning in 2012 (for calendar year plans) and through 2018, insurers that issue health insurance policies and plan sponsors of self-insured health plans are subject to a fee to fund the Patient-Centered Outcomes Research Institute (the "PCORI fee"). The PCORI fee, which is currently $2 (as adjusted to reflect inflation in National Health Expenditures, as determined by the secretary of the U.S. Department of Health and Human Services) per average covered life, is established as a federal tax under the Internal Revenue Code.

An update on the PCORI fee (and the ACA reinsurance fee) can be found at the Groom website at http://www.groom.com/media/publication/1267_PCORI_and_Reinsurance_Fees.pdf.

Retiree Drug Subsidy Deductibility

The Medicare Modernization Act of 2003 created both the Medicare Part D prescription drug benefit and a related 28 percent federal subsidy for employers that provide retiree drug coverage (at a level actuarially equivalent to the Medicare Part D benefit) to eligible retirees. Before the Act, the subsidy was excludable from a plan sponsor's taxable income and the sponsor did not have to reduce its deduction for retiree drug expenses as a result of receiving the subsidy.

Beginning in 2013, the Act disallows the deduction for retiree prescription drug benefits provided by an employer to its Medicare Part D eligible retirees to the extent the employer receives the federal retiree drug subsidy. This will have the effect of increasing an employer's costs of continuing to offer retiree drug coverage.

More immediately, the change resulted in a number of organizations being required to incur large expense charges in their income statements for the quarter including the date of enactment of the Act. For a discussion of this ACA provision and an alternative subsidy program (referred to as the Employer Group Waiver Program or "EGWP") that some employers are considering, please see Groom's website at www.groom.com/resources-664.html.

The "Cadillac Tax"

Starting in 2018, a 40 percent excise tax (the Excise Tax) — referred to by some as the "Cadillac plan tax" — will apply to the aggregate value of employer-sponsored health plan coverage that exceeds $10,200 for self-only coverage and $27,500 for family coverage.

The Excise Tax, which applies to both insured and self-insured plans, will be imposed on insurance companies, employers and plan administrators, depending on the type of arrangement involved. The $10,200 and $27,500 thresholds could be increased in 2018 if the actual growth in U.S. health care costs exceeds expected growth.

After 2018, the thresholds are indexed for cost-of-living adjustments. The thresholds may also be increased:

- To reflect the age and gender of the population covered
- For retired, non-Medicare eligible individuals between the ages of 55 and 64
- Where the majority of the employees in the plan are engaged in certain high-risk professions

The IRS has now issued initial guidance on the Excise Tax in Notices 2015-16 and 2015-52:

- In Notice 2015-16, the IRS provided guidance on the definition of applicable coverage, the determination of the cost of applicable coverage and on determining the applicable dollar threshold. An update on Notice 2015-16 can be found at the Groom website at http://www.groom.com/resources-950.html.
- In Notice 2015-52, the IRS provided additional guidance on certain other issues related to the Excise Tax.

Additional ACA Resources

You can find more detailed information regarding the Affordable Care Act by using the following resources:

- **The Affordable Care Act Explained:** The U.S. Department of Health & Human Services manages a website dedicated to explaining the Affordable Care Act at https://www.hhs.gov/healthcare.
- **The Internal Revenue Service's Affordable Care Act page:** The Internal Revenue Service manages a website that contains information regarding the tax-related provisions of the ACA that apply to employers at https://www.irs.gov/Affordable-Care-Act/Employers.

- **The U.S. Department of Labor, Employee Benefits Security Administration's Affordable Care Act page:** Contains links to numerous resources, including employer guidance and forms at http://www.dol.gov/ebsa/healthreform/.
- **Covered California:** California's health exchange, designed to help individuals and small businesses compare health plans, get answers to questions, find out if they qualify for federal tax credits and enroll in a plan that meets their specific needs at https://www.coveredca.com/ and at https://www.coveredca.com/forsmallbusiness/.
- **The Affordable Care Act:** The 974-page law in its entirety at http://housedocs.house.gov/energycommerce/ppacacon.pdf.

Health Savings Accounts (HSA)

HSAs provide for employee health benefits in the face of rising health insurance costs. They were created to encourage consumer-driven health plans. Plan participants pay directly for routine health care services, making participants more responsible consumers while reducing the cost of high-deductible insurance coverage.

Eligible individuals can accumulate money, tax-free, in HSAs to pay for qualified medical expenses. You or the individual can provide funds that are placed in an individually owned account, normally provided by a bank or insurance company. After the account is established and funded, earnings accrue on a tax-free basis and are portable without penalty if employment changes.[3]

The following is an introduction to health savings accounts. Further information is available on the Internal Revenue Service website at https://www.irs.gov/publications/p969/ar02.html and in the IRS Publication 969 at https://www.irs.gov/pub/irs-pdf/p969.pdf.

Eligibility for HSAs

HSAs are available to individuals who:

- Are covered by a high-deductible health plan
- Are not covered by another health plan
- Are not entitled to Medicare benefits
- Cannot be claimed as a dependant on another individual's tax return

Any person, including one who is self-employed or a partner in a business, is eligible to contribute to an HSA. If an individual is eligible to participate on the first day of the last month of the tax year, the individual is eligible for the entire year.

High-Deductible Health Plans

A High-Deductible Health Plan (HDHP) is a plan that has:

- A higher annual deductible than a typical health plan; and
- A maximum limit on the annual deductible and out of pocket expenses.[4]

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[3] 26 U.S.C. 223

[4] IRS Publication 969

The law specifies that an HSA participant must participate in a health plan with a minimum annual deductible of at least $1,300 per individual coverage and $2,600 for family coverage. The plan must have a limit on out-of-pocket expenses and the limits are indexed and may change annually based on increases in the cost of living.

ew 2016

For 2016, the out-of-pocket maximum is $6,550 for self-only coverage and $13,100 for family coverage.

The deductible must apply to all benefits under the plan with the exception of preventive care, which includes:

- Periodic health evaluations, including tests and diagnostic procedures ordered in connection with routine examinations, such as annual physicals
- Routine prenatal and well-child care
- Child and adult immunizations
- Tobacco cessation programs
- Obesity weight-loss programs
- Screening services[5]

A high-deductible health plan may provide preventive care benefits without a deductible or with a deductible below the minimum annual deductible.

These plans can be insured or self-insured by an employer or other organization. If the plan offers both in-network and out-of-network services, the dollar amounts used to determine high-deductible status exclude those applicable to out-of-network services. This may create higher maximum out-of-pocket limits for out-of-network services.

HSAs and Other Permitted Insurance

An individual can remain eligible for an HSA while maintaining certain other permitted insurance, including:

- Insurance coverage for a specific illness, such as cancer
- Hospital insurance that provides a per diem payment while hospitalized
- Workers' compensation, property or public liability coverage
- Employee Assistance Plans not providing significant medical care benefits
- Accident and disability insurance
- Dental, vision and long-term care

Qualified Medical Expenses

Qualified medical expenses (QME) that can be paid from the HSA funds include amounts for medical or long-term care for the HSA owner and his/her spouse or dependents. Records must be maintained showing distributions were made for qualified expenses. Medical insurance premiums are not QME unless they are COBRA premiums, health insurance premiums paid while receiving unemployment benefits, premiums for long-term care insurance or premiums paid while an individual is eligible for Medicare (except for Medigap policies).

HSA Contributions and Tax Benefits

Tax-favored contributions to an individual's HSA can be made by the individual or by you on behalf of the individual with tax dollars. The amount an employee, or any other person, can contribute to an employee's HSA depends on the type of high-deductible health plan coverage the employer offers, the employee's age, the date the employee becomes eligible and the date the employee ceases to be eligible. Visit the IRS website at www.irs.gov for the current amounts.

Contributions must be made in cash no later than the date of the individual's tax return. Individual contribution limits are reduced by amounts that you contribute to the HSA and by any contributions the individual makes to an Archer medical savings account (MSA).

An individual can contribute to an HSA even if he/she has no income or income less than the amount contributed. An individual's contributions are deductible from gross income and represent tax savings even if the taxpayer does not itemize. Excess contributions are subject to a six percent penalty for each year they remain in the account, but the penalty can be avoided by taking a distribution of the excess prior to the due date of the owner's tax return.

For married couples, the maximum family deductible is allocated equally between spouses, unless they agree to allocate differently. If both spouses are covered by separate high-deductible plans, the maximum contribution is based on the plan with the smallest deductible amount. If one spouse is providing family coverage under a high-deductible plan, both are treated as covered for tax purposes.

Eligible individuals over the age of 55 can make catch-up contributions.

Earnings on funds held in an HSA are not taxable, nor are distributions made to pay qualified medical expenses.

If an HSA distribution is made for nonqualified purposes, it is taxable and subject to a 10 percent penalty. A distribution made upon the death of the owner, or upon the owner's disability or eligibility for Medicare, is not subject to penalty. Funds can be rolled over from one HSA account to another once every 12 months and are nontaxable if the roll over is completed within 60 days. Upon the death of an HSA owner, the account can be transferred tax-free to a surviving spouse. Transfers to a non-spouse beneficiary are taxable to the beneficiary. Transfers to an estate are taxable to the owner in the year of death. In a divorce situation, funds transferred between HSAs are nontaxable.

Employer Participation in HSAs

Employers who choose to contribute to employee HSAs must make comparable contributions for all employees who participate in the employer's high-deductible health plan. The contributions must be in the same dollar amount or in the same percentage of the annual deductible in the applicable health plan. Penalties apply if the comparability rule is violated. You can also offer an HSA option by salary deduction under a cafeteria plan. Contributions must be reported on the employee *Form W-2*.

An HSA will not be considered a health plan under ERISA if establishing the HSA is voluntarily undertaken by the employee and you do not:

- Impose portability limitations or impose usage conditions other than those provided by law.
- Influence or limit the investment options.
- Establish or maintain the HSA as the company's plan.
- Receive any form of compensation in connection with the HSA.

You can limit wage deductions to a single provider or limit the number of providers that can market their products to employees through organization channels. If the HSA is not an ERISA plan, it is not covered by COBRA or HIPAA, nor does it require ERISA-specified plan documents or summary plan descriptions.

Same-Sex Spouses and Domestic Partner Benefits

On June 26, 2015, the U.S. Supreme Court issued a significant decision relating to same-sex marriage rights that can have important implications for employee benefit plans. In a 5-4 decision, the Supreme Court held that the due process and equal protection clauses of the 14th Amendment guarantee the right of same-sex couples to marry.

The Court held that same-sex couples may now exercise the fundamental right to marry in all states and there is no basis for any state to refuse to recognize a same-sex marriage performed in another state.[6]

The Court noted that bans on same-sex marriage curtail central notions of equality, denying same-sex couples benefits afforded to opposite-sex couples and barring them from exercising a fundamental right. According to the Court, "this denial works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians."

This decision was two years to the day after two earlier Court decisions expanding same-sex marriage rights. In *United States v. Windsor*, the Court held that Section 3 of the Defense of Marriage Act of 1996 (DOMA), which denied federal recognition of legally-married same-sex couples, was unconstitutional.[7]

At the same time, the U.S. Supreme Court also cleared the way for lawful same-sex marriages in California. Issued on the same day as the *Windsor* decision, *Hollingsworth v. Perry* let stand a lower court ruling that California's "Proposition 8" was unconstitutional. Proposition 8 amended the state constitution to define marriage as a union between a man and a woman.[8] As a result, same-sex marriages became lawful in California.

All of these decisions have several implications for the administration and taxation of employee benefits. The most recent ruling should lead to more administrative consistency across the 50 states. As in the past, guidance from various federal agencies is likely forthcoming. The definition of "spouse," as the U.S. Supreme Court noted, appears in a multitude of federal statutes and regulations which impact employers, including:

- COBRA coverage
- ERISA benefit plans
- The Family and Medical Leave Act (FMLA)
- The Health Insurance Portability and Accountability Act (HIPAA)
- Flexible spending accounts
- The Internal Revenue Code

For information on the impact of these court decisions on the Family and Medical Leave Act, see "FMLA and CFRA Qualifying Reasons" in Chapter 18, page 472.

Administration of benefits in California is further complicated by the fact that registered domestic partners are also recognized in the state, but may or may not be treated the same as spouses under federal law. For more information, see "Registered Domestic Partnership" in Chapter 26, page 729.

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[6] *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015)

[7] *U.S. v. Windsor*, 133 S.Ct. 2675 (2013)

[8] *Hollingsworth v. Perry*, 130 S.Ct. 705 (2013)

California plays a leading role in recognizing the rights of domestic partners. This includes specific requirements to treat registered domestic partners as equal to spouses when it comes to health insurance benefits. There are also specific requirements for companies that have contracts with the State of California in excess of $100,000.

Employers should contact their benefit plan administrators or benefits counsel to ensure that their benefits are being administered consistent with applicable state and federal laws relating to same-sex spouses and registered domestic partners.

Health Insurance Premium Payment Program

California's Health Insurance Premium Payment (HIPP) Program requires all California employers (including those not covered by COBRA) to provide terminating employees with notice of special state programs that pay COBRA premiums under certain circumstances.[9]

This is not to be confused with the federal Health Insurance Portability and Accountability Act (HIPAA).

HIPP Notice

HIPP Notice - Spanish

The HIPP notice is required under California law. It is not related to the federal HIPAA or COBRA laws. For more information, see "Employee Notices" in Chapter 29, page 906.

Health Insurance Portability and Accountability Act (HIPAA)

The federal HIPAA affects many aspects of health insurance, including privacy of patient information, security of medical information, and electronic exchange of medical information between physicians and health insurance plans. HIPAA rules have changed to reflect federal health care reform under the Patient Protection and Affordable Care Act (generally referred to as the ACA). For more information, see "Federal Health Care Reform Overview" on page 423. The "Additional ACA Resources" on page 435 also provides sources for additional information about the ACA.

In the past, HIPPA required employers to provide certificates of creditable coverage to individuals switching from one health plan to another. This was a core legal requirement necessary to protect employees from pre-existing condition exclusions. However, final regulations published by the U.S. Department of Health and Human Services have put an end to the requirement to issue certificates of creditable coverage as of December 31, 2014.

These regulations were implemented in response to the fact that the ACA forbids most pre-existing condition exclusions. Since pre-existing conditions are generally no longer a bar to health care coverage there is no need to establish prior coverage, per the regulations.

Employee Retirement Income Security Act (ERISA)

With the exception of wages and salaries, you attract and retain qualified personnel primarily through employee benefits. If you want to provide benefits, you must know the fundamentals of establishing, amending or terminating an employee benefit plan. The following section presents an extremely brief overview of the Employee Retirement Income Security Act (ERISA); the basic federal law that defines your duties in administering an employee benefit program.

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[9] Lab. Code sec. 2807

ERISA[10] is by far the most comprehensive and important federal law relating to employee benefit plans. It deals with establishing, operating and administering two types of employee benefit plans: welfare plans and pension plans.

This discussion of ERISA presents an extremely brief overview. Consult legal counsel for assistance in complying with this complex and technical area of the law.

ERISA consists of four titles. This topic examines only Title I's provisions, which:

- Focus primarily on protecting employee benefits
- Contain provisions requiring reporting and disclosure of plan information
- Set standards of participation, vesting, funding and fiduciary responsibilities
- Provide for administration and enforcement
- Govern the structure (for example, written form) and content (for example, minimum participation standards) of pension and welfare plans:
  - Plan administration (for example, fiduciary responsibility)
  - The plan's interactions with other components of plan administration (for example, prohibited transactions)

Title I also states that ERISA supersedes or pre-empts all state laws relating to either pension or welfare plans.[11]

Plans Covered by ERISA

ERISA regulates employee benefit plans and the people (for example, employers and unions) involved in establishing and maintaining these plans. The term "employee benefit plan" includes both employee welfare benefit plans and employee pension plans.[12]

Section 3(1) of ERISA defines "employee welfare benefit plan" to mean:

- Any plan, fund or program established or maintained by an employer, an employee organization or both, to the extent that the plan, fund or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise:
  - Medical, surgical or hospital care or benefits; or benefits in the event of sickness, accident, disability, death or unemployment; or vacation benefits, apprenticeship or other training programs or day care centers, scholarship funds or prepaid legal services.
  - Any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide pensions).

The most common types of plans affected by the reporting and disclosure requirements are:

- Retirement or pension plans

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[10] 29 U.S.C. 1001 et seq.

[11] ERISA sec. 514

[12] ERISA sec. 4(a)

- Profit-sharing and 401(k) plans
- Thrift and savings plans
- Money purchase plans
- Employee stock ownership plans
- Qualified stock bonus plans
- Employee welfare benefit plans
- Life insurance
- Medical, hospital and surgical benefits, including vision, dental and EAPs
- Severance plans
- Accident insurance
- Short- and long-term disability plans
- Supplemental unemployment payments
- Paid legal services

ERISA excludes certain employee benefit plans from coverage, including plans:[13]

- Sponsored by governmental entities
- Sponsored by religious organizations
- Maintained solely for the purpose of complying with workers' compensation laws, unemployment compensation laws or state disability insurance laws
- Maintained outside the United States primarily for the benefit of nonresident individuals
- Maintained solely to provide benefits in excess of the limitations in contributions and benefits imposed by ERISA[14]

Fiduciary Requirements Imposed by ERISA

ERISA imposes a fiduciary duty on plan administrators that requires them to act in the best interests of the beneficiaries of the plans they administer. The scope of that duty, as defined by the courts, must guide anyone who fills that role, whether he/she is an organization's employee or an outside plan administrator.

Advising Individual Employees of Changes in Benefits

Organization representatives, particularly HR personnel, must disclose information to the workforce when that information impacts the value of their benefits.

For example, when considering amending an ERISA plan, an employer fiduciary must truthfully answer employee questions about the substance of a potential change in benefits if you are seriously considering a change. Serious consideration takes place when a specific proposal is being discussed for purposes of implementation by senior management with the authority to implement the change. It is sufficient that the plan be considered by those members of senior management with responsibility for the benefits area of the business and who will make recommendations to the board of directors about benefits operations.[15]

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[13] ERISA sec. 4(b)

[14] ERISA sec. 4(b), 29 U.S.C. 1003(b)

An employer fiduciary cannot actively misinform its plan beneficiaries about the availability of future retirement benefits to induce the beneficiaries to retire earlier than they otherwise would, regardless of whether future plan changes are being seriously considered. Further, even before serious consideration begins, an employer fiduciary has a duty to not actively misinform its employees in an attempt to induce them to retire earlier than they otherwise would.[16] That duty does not require that an employer fiduciary become a personal adviser or counselor to individual employees, except in limited circumstances.

ERISA Reporting and Disclosure

Title I of ERISA imposes the following reporting and disclosure provisions:

- You must furnish employees with understandable and reasonably comprehensive summaries of employee benefit plans (summary plan descriptions), updates when major changes are made and summaries of annual reports on the financing and operation of the plans.
- You must give employees, at their request, a report on the status of their vesting and accrued pension benefits. If they leave your organization on a temporary or permanent basis, give them the report.
- Employee benefit plans must annually report certain detailed financial and actuarial data to the IRS and submit audited financial statements to federal agencies.

Nondiscrimination and ERISA

Employers and plan sponsors are generally free to adopt changes or terminate an employee benefit plan if they do not deprive participants or beneficiaries of vested benefits. However, ERISA makes it unlawful to terminate, fine, suspend, expel, discipline or discriminate against a covered benefit plan participant or beneficiary for the purpose of interfering with any plan rights.

For example, in the context of the sale of a business, a buyer and seller agreed that employees who were actively at work with the seller on the closing date of the sale or employees on a nonmedical, nonextended leave, vacation or a personal day off, would automatically transfer to the buyer's payroll and be covered by its benefits plans.

If an employee was on a medical leave, workers' compensation leave or other extended leave at the time of the sale, his/her employment and benefits would terminate and he/she would be eligible for transfer and benefits only if returning to active employment. The court ruled that this exclusionary provision in the buy/sell agreement violated ERISA's nondiscrimination provision.[17]

San Francisco Health Care Security Ordinance

The Health Care Security Ordinance (HCSO) requires covered employers to make health care expenditures for their covered employees and mandates the Department of Public Health (DPH) to create the Health Access Plan (HAP), now called Healthy San Francisco. Healthy San Francisco is only one option by which a covered employer can satisfy its obligation to make the required health care expenditure (HCE). Covered employers may also purchase health insurance coverage for their covered employees, make payments to the city for the benefit of their covered employees or make the required HCE in a variety of other manners.

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[15] *Bins v. Exxon Company U.S.A.*, 220 F.3d 1042 (9th Cir. 2000)

[16] *Wayne v. Pacific Bell*, 238 F.3d 1048 (9th Cir. 2001)

[17] *Lessard v. Applied Risk Management*, 307 F.3d 1020 (9th Cir. 2003)

For-profit employers with 20 or more employees and non-profit employers with 50 or more employees are covered by the "Employer Spending Requirement" of the HCSO. All employees, regardless of where they live or work, must be counted for purposes of determining employer coverage. All members of a controlled group of corporations are considered one employer. For-profit employers with fewer than 20 employees and non-profit employers with fewer than 50 employees are exempt from the spending requirement.[18]

New 2016

The health care expenditure rates for 2016 are as follows:

Employer Health Care Expenditure Rate Schedule

Business Size	**January 1, 2016**
All employers with 100+ employees	$2.53/hr
For-profit employers with 20-99 employees and non-profit employers with 50-99 employees	$1.68/hr
For-profit employers with 0-19 employees and non-profit employers with 0-49 employees	N/A

Covered employers must maintain sufficient records to establish their compliance with the employer spending requirement. Covered employers are required to post a city-provided notice setting forth employee rights and employer obligations under the HCSO.

The notice is available on San Francisco's Office of Labor Standards Enforcement (OLSE) website at http://sfgsa.org/index.aspx?page=418. Covered employers must submit an Annual Reporting Form to the OLSE by April 30th of each year.

In 2014, the HCSO was amended and updated administrative guidance issued. The amendments include phasing in (over three years) a requirement that all heath care expenditures be made irrevocably, as well other changes to the HCSO. The OLSE provided guidance on:

- Revocable and irrevocable health care expenditures and the 2014 amendments
- The impact of the Affordable Care Act on the HCSO
- Making and reporting health care expenditures and enforcement

Annual Salary Exemption Figure

New 2016

An employee who is a manager, supervisor or confidential employee and who earns at or above an annual salary of $92,990 or an hourly salary of $44.71 in 2016 is exempt from coverage under the HCSO. Please review Regulation 3.2(A)(1) for a detailed definition of a manager, supervisor or confidential employee.

For more information on this ordinance, visit San Francisco's Office of Labor Standards Enforcement's website at www.sfgsa.org/index.aspx?page=418.

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[18] San Francisco Administrative Code, Chapter 14

COBRA

COBRA is a federal law that gives employees and their families who lose health benefits the ability to choose to continue group health benefits provided by their group health plan for limited periods of time under certain circumstances, such as:

- Voluntary or involuntary job loss
- Reduction in hours worked
- Transition between jobs
- Death, divorce and other life events

Employers Covered by COBRA

If you offer a group health plan and employ 20 or more people, you must extend federal COBRA rights to continue benefits under the plan to all qualified beneficiaries.

If you employ 2 to 19 people, federal COBRA provisions do not apply. However, you may be covered by Cal-COBRA. For more information, see "Cal-COBRA" on page 460.

The determination of COBRA coverage is made based on the number of employees employed in the previous calendar year. Any new employer, no matter how large, is not technically covered by COBRA in its first year of existence unless it had a predecessor or it is part of a controlled group of organizations covered by COBRA.

The law considers a business or corporation an employer of 20 employees during a calendar year if it had 20 employees on at least 50 percent of its typical business days during that year. All related business entities under common control also are considered a single employer for purposes of counting the number of employees to determine if the employer is covered by COBRA, including worldwide employees in the case of multinational employers.[19]

The 20-employee minimum includes all full-time and part-time employees, regardless of their participation in the group health plan. Part-time employees count as a fraction of an employee, with the fraction equal to the number of hours the part-time employee works for you, divided by the number of hours an employee must work to be considered full-time. A full-time employee, for the purposes of COBRA, can work no more than 40 hours per week or eight hours per day. Employees can be counted on either a typical business day or by pay period. You must use your chosen method consistently.[20]

If you increase your workforce to 20 or more during the current calendar year, the single employer plan ceases to be a small-employer plan and becomes covered by COBRA on the following January 1.[21] If a multi-employer plan ceases to be a small-employer plan because of the addition of an employer who had 20 or more employees in the preceding year, the plan becomes covered by COBRA immediately.[22]

An employee otherwise entitled to continuation coverage will continue to qualify for coverage even if your workforce drops below 20 employees after COBRA coverage commences.[23]

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[19] [illegible]

[20] [illegible]

[21] [illegible]

[22] [illegible]

[23] [illegible]

Informing employees of the availability of continued medical coverage under COBRA — even in error (for example, a small employer that's not covered by COBRA but informs employees of COBRA coverage) — can mandate the employer to provide coverage because the employees relied on the employer's information.[24]

COBRA Coverage After Acquisition

An employer is considered to have employed fewer than 20 employees during a particular calendar year if it had fewer than 20 employees on at least 50 percent of its typical business days. Special rules apply when, as a result of an acquisition, the employer's workforce increased beyond 20 employees. The type of sale determines when COBRA obligations begin.[25]

A stock sale is a transfer of stock in a corporation that causes the corporation to become a different employer or a member of a different employer. In applying the small-employer plan exception to a group health plan maintained by the combined entity following the stock transfer, employees of both employers during the previous calendar year must be considered. Where the combined employers normally employed at least 20 employees during the previous calendar year, a group health plan maintained by the combined entity becomes covered by COBRA as of the date of the stock transfer.

Example: Company P maintains a group health plan and normally employed fewer than 20 employees during the previous calendar year. During the current calendar year, stock in Corporation O is transferred so that after the transfer P and O are considered a single employer. The combined number of employees normally employed by P and O during the previous calendar year was at least 20. A group health plan maintained by the combined entity ceases to be exempt from COBRA as a small-employer plan as of the date of the stock transfer.

An asset sale is a transfer of substantial assets, such as a plant or division, or all the assets of a trade or business. A buyer of substantial assets is considered a successor employer when he/she continues the business operations associated with the purchased assets without interruption or substantial change, and the seller ceases to provide any group health plan to any employee in connection with the sale.

Example: Company R maintains a group health plan and normally employed fewer than 20 employees during the previous calendar year. During the current calendar year, R acquires substantially all assets of a business and continues the business operations associated with those assets without interruption or substantial change. The combined number of employees normally employed by R and the acquired business during the previous calendar year was at least 20.

The acquisition of assets by R does not cause R to be considered a single employer with any part of the seller of the assets. The group health plan maintained by R continues to be exempt from COBRA until January 1 following a year in which R normally employed at least 20 employees.

However, if R acquires substantial assets of the seller, continues the business operations associated with the purchased assets without interruption or substantial change and the seller ceases to provide any group health plan to any employee in connection with the sale, R is a successor employer and must make COBRA continuation coverage available to any qualified beneficiaries of the seller even though R is otherwise excepted from COBRA.

Plans Covered

Under COBRA, a covered group health plan must offer each qualified beneficiary (see "Qualified COBRA Beneficiaries" on page 448") who would otherwise lose coverage under the plan as a result of a qualifying event (see "Qualifying Events and Extending COBRA Coverage" on page 448) an opportunity to choose to continue the coverage being received immediately before the qualifying event.

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[24] *Haley v. Trees of Brookwood*, 838 F. Supp. 1553 (N.D. Ala. 1993)

[25] I.R.S. Revenue Ruling 2003-70

A qualified beneficiary who chooses continuation generally can be initially charged an amount no greater than 102 percent of the applicable premium, which is based on the plan's cost of providing coverage.

COBRA does not require you to *provide* either group health plans or health benefits to employees. It covers group health plans that you already maintain, when qualifying events occur to covered employees. Though you can maintain multiple plans, each with separate documentation, federal law considers all health benefits you provide to be under a single plan unless:

- It is clear that the plans are separate
- Separate arrangements exist for their operation[26]

Covered Group Health Plans

To qualify as a covered group health plan under COBRA, the plan must provide health care and you must maintain the plan.[27]

Health care includes the diagnosis, cure, mitigation, treatment or prevention of disease and any other medical effort affecting any structural function of the body. The law considers an employer to be maintaining a group health plan for employees if coverage under the plan would not be available at the same cost to the employee if he/she were not employed by you, regardless of if you contribute to the group health plan.[28] This also includes a scheme whereby you pay for individual policies for your employees.[29]

In addition to medical coverage, COBRA extends to other benefits, such as dental and vision coverage, and, under certain circumstances, medical and health flexible spending accounts provided under a cafeteria plan and Employee Assistance Programs (EAPs).

Medical Savings Accounts and Cafeteria Plans

Under Internal Revenue Service (IRS) regulations, amounts contributed by an employer to a medical savings account are not considered part of a group health plan subject to COBRA, and employers therefore do not need to provide COBRA continuation coverage for such plans.[30]

However, COBRA continuation coverage requirements apply to cafeteria plans and other health flexible spending arrangements (health FSAs). The COBRA continuation coverage requirements apply only to the type and level of coverage under the cafeteria plan or other flexible benefit arrangement that a qualified beneficiary is actually receiving on the day before the qualifying event.[31]

A health FSA will not be obligated to provide COBRA continuation coverage if, as of the date of the qualifying event, the maximum benefit available for the remainder of the plan year is less than the required COBRA premium for the balance of the year. For example, if the employee sets aside $100 per month (or $1,200 per year) and leaves in July after contributing $700 to the MSA and submitting claims for $800, for the rest of the year the qualified beneficiary could submit claims for only $400 ($1,200 minus $800) and COBRA premiums under the MSA would amount to $500 ($1,200 minus $700) plus two percent. Under these circumstances, COBRA would not apply. However, if only $400 was spent before a qualifying event and the beneficiary had a positive balance, COBRA rights would apply. COBRA continuation coverage will not be available for any subsequent plan year.[32]

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[26] Treas. Reg. sec. 54.4980B-2, Q&A-1

[27] Treas. Reg. sec. 54.4980B-2, Q&A-1

[28] Treas. Reg. sec. 54.4980B-2, Q&A-1

[29] *Burrill v. LECO Corp.*, 1998 U.S. Dist. Lexis 8178, W.D. Mich (1998)

[30] Treas. Reg. sec. 54.4980B-2, Q&A-1

[31] Treas. Reg. sec. 54.4980B-2, Q&A-8

After the initial COBRA plan year, COBRA need not be continued if the health FSA isn't covered by HIPAA's portability provisions (see "Health Insurance Portability and Accountability Act (HIPAA)" on page 440) and the maximum premiums during the initial COBRA plan year would exceed the available benefits. This generally would apply, because qualified beneficiaries must pay 102 percent of the premium but could recover only 100 percent.

Employees Covered by COBRA

A qualified beneficiary is any individual provided coverage on the day before a qualifying event under a group health plan as a result of performing services for the covered employer.[33]

Qualified COBRA Beneficiaries

Only qualified beneficiaries are entitled to continued coverage under COBRA. This includes:

- Employees who are terminated either voluntarily or involuntarily, except those terminated for gross misconduct.
- Employees whose hours of work are reduced to a level that precludes them from coverage under the plan.
- Covered spouses and dependent children of the covered employees.
- Children born to or placed for adoption with a covered employee during the COBRA continuation period.

To be considered a qualified beneficiary, an individual must have been covered by the plan on the day before the qualifying event occurred, with the exception of a child born to or placed for adoption with an employee during the COBRA continuation period.

It is important to note that a qualified beneficiary can add new dependents to the plan while on COBRA if those individuals become dependents after the qualifying event. If a former employee on COBRA remarries and has a new child, the employee can add both the new spouse and child to the plan.

For information on same sex-spouses, see "Same-Sex Spouses and Domestic Partner Benefits" on page 439.

Qualifying Events and Extending COBRA Coverage

A "qualifying event" under COBRA is an event that would result in an individual losing group health coverage.

The type of qualifying event will determine who the qualified beneficiaries are. Under COBRA, six events can be qualifying events if they result in loss of coverage. These six events and the length of coverage they trigger are:

- Death of the covered employee (spouse and dependent child of covered employee are covered for up to 36 months)

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[32] Treas. Reg. sec. 54.4980B-2, Q&A-8
[33] Treas. Reg. sec. 54.4980B-3, Q&A-1

- Termination (other than by reason of gross misconduct) or reduction of hours of the covered employee's employment (coverage for up to 18 months for covered employee, spouse and dependent child)
- Divorce or legal separation of the covered employee from the employee's spouse (former spouse and dependent child covered for up to 36 months)
- The covered employee becomes entitled to benefits under Medicare (coverage for up to 36 months for the covered spouse and dependent child)
- The dependent child ceases to be a dependent under the requirements of the plan (coverage for up to 36 months for the formerly dependent child)
- An employer's bankruptcy, but only as it relates to health care coverage for retirees and their dependents (coverage for up to 36 months)[34]

California law requires health plans and insurers to offer individuals extended COBRA coverage up to a combined total of 36 months if those individuals have exhausted COBRA coverage.

Multiple qualifying events can occur and cause COBRA coverage to be extended. If a second qualifying event occurs during the period of COBRA coverage triggered by the first qualifying event (for example, the death of a covered employee within the coverage period triggered by a reduction in hours), coverage may be extended to a maximum of 36 months from the first qualifying event. This extension is required only if the second qualifying event would have created an entitlement to 36 months' coverage if it had occurred before the first qualifying event.[35]

> **Example:** John Smith lost his job on January 1, 2015. He elected coverage for himself and his family. On January 1, 2016, after 12 months of continuous COBRA coverage, John died. His family can continue coverage beyond the original 18 months' entitlement by an additional 18 months, until December 31, 2017. Had John lived, coverage for all would have ended no later than June 30, 2016.

The law provides that one of these listed events causes a loss of coverage triggering COBRA when, under a plan's terms, the terms and conditions of coverage are different than what was in effect immediately before the qualifying event. Loss can occur anytime within the maximum COBRA coverage period.[36] An increase in premiums due to the qualifying event is also a loss of coverage.[37] If you continue an employee on a plan after termination, but at an increased cost to the employee, that constitutes a loss of coverage for COBRA purposes.

Business Reorganizations and COBRA

Business reorganizations, such as a business closing, selling assets or outright selling a business's stock, can trigger COBRA rights when employees are terminated. Business reorganizations also can end COBRA obligations when there are no surviving health plans within related organizations.[38] Seek legal counsel about COBRA considerations before proceeding with a business reorganization.

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[34] 29 U.S.C. 1163

[35] Treas. Reg. sec. 54.4980B-7, Q&A-6

[36] Treas. Reg. sec. 54.4980B-4, Q&A-1(c)

[37] Treas. Reg. sec. 54.4980B-4, Q&A-1(c)

[38] Treas. Reg. sec. 54.4980B-9

COBRA Extension for Disabled Beneficiaries and Their Dependents

As interpreted by the IRS, COBRA provides that:[39]

- If one qualified beneficiary is disabled, all qualified beneficiaries in that family are entitled to an additional 11 months of coverage. COBRA provides that the premium charged to non-disabled beneficiaries need not be 150 percent if the plan offers a premium category that allows the disabled qualified beneficiaries to be separately classified.[40]
- The Social Security Administration (SSA) need not make a determination that a qualified beneficiary is disabled at the time of the qualifying event. A determination of disability can occur at any time before the 60th day of COBRA coverage.
- An additional 11 months of coverage is available when the disabled person is any qualified beneficiary, not a former employee. For example, a man's employment terminates and, 30 days later, his wife is in a car accident. The SSA determines her to be totally disabled as a result of the accident. She can get the extended coverage in her own right, and her husband also can continue his COBRA coverage for the same extended period.

To receive an extension, a qualified beneficiary must notify your plan administrator of the SSA's disability determination no later than 60 days after the determination date and within the original 18-month COBRA period. If the SSA should subsequently notify the disabled, qualified beneficiary that he/she is no longer disabled, the qualified beneficiary should notify your plan administrator within 30 days. From that time forward, as of the first of the month — and at least 30 days after notice — COBRA coverage will end for all qualified beneficiaries if coverage is within the extension period.

Denying and Terminating COBRA Coverage

Gross misconduct provides a basis for denying COBRA coverage to the employee and to the employee's dependents. The only California case on this subject, *Paris v. F. Korbel & Bros., Inc.*, applied the same standard used to deny unemployment benefits under California law.[41] See Chapter 16, "Unemployment Insurance" for more information on this standard.

Mere inefficiency, inability, ordinary negligence or bad judgment does not equal gross misconduct for COBRA purposes. You could face substantial consequences if disqualifying an employee due to gross misconduct.

Be extremely careful in using the "gross misconduct" designation. You may want to avoid using disqualifications or seek qualified legal advice before taking action.

COBRA coverage terminates either at the end of the coverage period required by law, or when one of the following events occurs:

- Termination of all employer-provided group health plans
- The employee fails to pay required premiums (keep in mind that grace periods apply)
- A qualified beneficiary becomes entitled to Medicare benefits after a qualifying event
- A qualified beneficiary becomes covered under any other group health plan if the plan does not exclude or limit coverage for a qualified beneficiary's existing conditions[42]

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[39] 63 FR 708 (January 1, 1998)

[40] Treas. Reg. sec. 54.4980B-8(b)

[41] *Paris v. F. Korbel & Bros., Inc.*, 751 F. Supp. 834 (N.D. Cal. 1990)

[42] 29 U.S.C. 1162(2)(B), (C), (D); Treas. Reg. sec. 54.4980B-7, Q&A-1, Q&A-2

COBRA Termination Notice

The plan administrator must provide notice of termination of coverage occurring before the end of the maximum coverage period to qualified beneficiaries receiving continuation coverage.[43] There is no particular format or time limit specified, but the notice must be given as soon as is practicable and must include all of the following:

- Reason for early termination
- Date of termination
- Any rights the qualified beneficiary may have under applicable law or the plan to choose alternative group or individual coverage

Notice of Ineligibility for COBRA

If a plan administrator determines that an individual is not eligible for continuation coverage upon receiving notice of a qualifying event or a second qualifying event, the plan administrator must send a notice to the individual explaining the reason for ineligibility. The law does not require a specific form to be used, but the notice must be in language that can be understood by the average plan participant. It must be sent within 14 days of receiving the notice of a qualifying event.

COBRA Coverage Must Equal Active Employees' Coverage

COBRA requires that coverage, in terms of benefits, deductibles and coverage limits, be identical to similarly situated active plan participants.[44] Changes in the plan for active participants (for example, a higher deductible, change in coverage limits or benefits or terminating the plan) similarly will affect those participating through COBRA.

Likewise, whenever an active employee can make changes in coverage or add dependents, such as at annual open enrollments, so can all qualified beneficiaries participating in coverage through COBRA. All notices you provide to active employees should also be provided to qualified beneficiaries.

Converting a Group Policy to an Individual Policy

State law generally requires both insurance companies and HMOs to allow group health plan participants, whose coverage under a group plan is terminated for a reason other than nonpayment of premiums, to convert to an individual policy without having to present evidence of insurability.

Under California law, you must notify an employee of the right to convert to an individual policy within 15 days of termination of group coverage.[45] COBRA requires plan administrators to provide notice of any conversion rights — both at the time of the qualifying event and when COBRA coverage ends.[46] ERISA, the federal law that regulates employee benefit plans, may pre-empt this requirement. See "Employee Retirement Income Security Act (ERISA)" on page 440 for more information. Employee associations and entities providing hospital, surgical or major medical benefits to their employees or members must also provide conversion coverage.

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[43] 29 CFR sec. 2590.606-4(d)

[44] 29 U.S.C. 1162(1)

[45] Lab. Code sec. 2806.2

[46] Treas. Reg. sec. 54.4980B-7, Q&A-8

COBRA Notice Requirements

Federal law requires you to notify an employee of COBRA rights both at the time he/she becomes covered by a plan covered by COBRA[47] and at the time of a qualifying event.[48] These rules affect the content and delivery of all of the following:

- The *General Notice of COBRA Continuation Coverage Rights*
- An employer's notice of qualifying event
- Notices for employees and qualified beneficiaries
- The *COBRA Continuation of Coverage Election Notice*
- Plan administrator's notices, including the Termination Notice and Unavailability Notice

The federal government made changes to the model notices informing workers of their eligibility to continue health care coverage through COBRA. The changes were made to the *General Notice of COBRA Continuation Coverage Rights* and to the *COBRA Continuation Coverage Election Notice*. The changes added language informing workers that if they are eligible for COBRA continuation coverage when leaving a job, they may choose to instead purchase coverage through the federal Health Insurance Marketplace.

In addition to information regarding COBRA, California employers need to provide information relating to extension of benefits under Cal-COBRA. California employers should use the modified California versions of the federal COBRA notices which contain information about Cal-COBRA for California employees. The federal model versions do not contain information specific for California employers.

The U.S. Department of Labor (DOL) issued a notice of proposed rulemaking to update its regulations with respect to the model COBRA notices.

Although the regulations have not been finalized, employers should begin using the updated notices now.

General Notice of COBRA Continuation Coverage Rights

The *General Notice of COBRA Continuation Coverage Rights* (formerly referred to as the Initial Notice) must be provided to each employee and spouse within 90 days of the date that coverage begins or the first date on which the plan administrator is required to advise a qualified beneficiary of the right to choose continuation coverage, whichever comes first. If a qualifying event occurs within the first 90 days of coverage, but before the General Notice has been provided, it is sufficient to provide the election notice only.[49] This notice generally describes COBRA rights.

The content of the General Notice can be included in the Summary Plan Description (SPD) or the HMO Explanation of Coverage (EOC). If the SPD or EOC with the General Notice content is provided to the employee and spouse within 90 days of coverage by the plan, it is unnecessary to deliver a separate General Notice.

CalChamber provides two versions of a model General Notice, both of which comply with COBRA:

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[47] 29 U.S.C. 1166(a)(1)
[48] 29 U.S.C. 1166(a)(4)
[49] 29 CFR sec. 2590.606-1

The General Notice of COBRA Continuation Coverage Rights - Outside California is to be provided only for employees outside the state.

The General Notice of COBRA Continuation Coverage Rights - California Employees includes information required as a result of the Cal-COBRA extension of continuation coverage and should only be provided for employees in California.

The General Notice must be provided to the employee and spouse:

- If mailed, it must be mailed separately to each unless, at the time it is provided, the plan has records indicating the employee and spouse live at the same address. In that case, the notice must be addressed to both the employee and spouse.
- If spousal coverage begins after the employee's coverage, a separate notice must be given. For example, if the employee divorces and then remarries, the new spouse must be given separate notice upon commencing coverage.
- If the employee is given the General Notice personally, a separate copy must be mailed to the spouse. Separate notice need not be given to dependent children.

You may be liable to people other than the employee if you fail to properly notify them of their rights under COBRA.

> **Example:** In *Lawrence v. Jackson Mack Sales, Inc.*, an employee's wife was not given notice of her COBRA rights at the time she and the employee divorced. She did not receive an initial notice of COBRA rights when her husband became covered by the employer's group health plan. The employer terminated her health insurance coverage at the time of the divorce. The court ruled that a spouse should always receive actual notice about his/her rights to continuation of coverage.
>
> Even though the employee did not notify the employer of the divorce (qualifying event) within the 60-day period required to elect COBRA coverage, the court determined that the failure to send the initial notice was improper and that the wife could pursue a legal claim against the employer.[50]

This case may well have been less costly to the employer if the employer provided a copy of the initial COBRA notice and a copy of the plan's SPD to the spouse within 90 days of the employee initially becoming covered by group health coverage.

COBRA Notice to Plan Administrator

A group health plan must offer continuation coverage when a qualifying event occurs. The group health plan is not required to act until it receives appropriate notice of the qualifying event.

You must notify the plan administrator within 30 days of an employee's loss of coverage due to termination, reduction in hours, death, Medicare entitlement or your bankruptcy event.[51]

COBRA does not require any special format for the notification, but does specify that the contents of the notice must enable the plan administrator to clearly identify the plan, the covered employee, the qualifying event and the date of the qualifying event.

The COBRA Notice to Plan Administrator will satisfy these requirements for plans in and outside California.

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[50] *Lawrence v. Jackson Mack Sales, Inc.*, 837 F. Supp. 771 (SD Miss. 1992) aff'd, 42 F.3d 642 (5th Cir. 1994)

[51] 29 CFR sec. 2590.606-2; 29 U.S.C. 1166(a)(2)

COBRA Notice From Employees and Qualified Beneficiaries

COBRA requires employees or other qualified beneficiaries to notify the plan administrator (who may or may not be the employer) within 60 days of the following qualifying events to be eligible for COBRA:

- Divorce or legal separation of a covered employee from a spouse
- Termination of coverage as a dependent child
- The SSA's declaration of a qualified beneficiary's disability
- The SSA's termination of a qualified beneficiary's disability status[52]

COBRA permits an employer or plan to establish reasonable procedures for giving these notices, including specific forms that must be used.[53] The plan can set a different time limit, but it cannot be shorter than 60 days. Procedures will be considered reasonable if they meet all of the following criteria:

- Are included in the SPD
- Specify the individual or entity to receive the notices
- Specify the means by which the notices can be given
- Describe the information on the qualifying events that must be included
- Provide a reasonable time period for providing notice, which cannot be less than the minimums contained in the regulations implementing COBRA[54]

As a result, employers and plans can now avoid some contested notification issues by specifying procedures and forms that employees must use. If an employer or plan does not specify procedures and forms to use, qualified beneficiaries can give any type of verbal or written notice identifying a qualified event to the person or entity that customarily handles your employee benefit matters, including your insurance company, a third-party administrator or any officer of the insurance company or third-party administrator.[55]

COBRA Continuation Coverage Election Notice

After the plan administrator receives notice of a qualifying event, the administrator must notify the qualified beneficiaries of their COBRA rights within 14 days.[56] If you are the plan administrator, the notice must be sent no later than 44 days after the date coverage is lost or the date of the qualifying event, whichever the plan requires.[57]

CalChamber provides two versions of a model election notice, both of which comply with the regulations:

The COBRA Continuation Coverage Election Notice - Outside California is to be provided only for employees outside the state.

The COBRA Continuation Coverage Election Notice - California Employees includes information required as a result of the Cal-COBRA extension of continuation coverage and should only be provided to employees within California.

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[52] 29 CFR sec. 2590.606-3; Treas. Reg. Section 54.4980B-6, Q&A-2

[53] 29 CFR sec. 2950.606-3(b)

[54] 29 CFR sec. 2950.606-3(c)

[55] 29 CFR sec. 2590.606-(b)(4)

[56] 29 CFR sec. 2590.606-4(b)(1)

[57] 29 CFR sec. 2590.606-4(b)(2)

Notification by regular U.S. mail is sufficient. If you choose to send registered mail and request a return receipt, you should still send another copy through regular mail. This ensures that you satisfied your obligation to provide notice if the recipient fails to receive and sign for the copy sent via registered mail.

- If the employee and spouse live at the same address, a single notice can be sent. But it must be addressed to both and is considered notice to covered dependents.
- Hand delivery to the employee at work is considered notice to covered dependents living with the employee. If hand delivered to the employee at work, a separate notice must be sent to the spouse even if living at the same address.
- If the covered employee and his/her spouse do not reside at the same address, send a separate notice to the spouse. You can ask the employee for this address or if this is not possible, send the notice to the last known address.
- Notice to the spouse is considered notice to all other beneficiaries residing with the spouse.[58]
- Include current copies of all SPDs or an EOC with the notice.
- Enclose the *COBRA Rights - Acknowledgment of Receipt of Notification* for any covered employee plus other family members. State that the employee's coverage is ending due to termination of employment or reduction in hours or other qualifying event.
- Keep dated copies of all notices sent, including addresses and methods by which they were sent.

COBRA Rights - Acknowledgment of Receipt of Notification

Failure to provide the appropriate COBRA election form to all qualified beneficiaries on a timely basis creates significant legal liability.

In *Emilien v. Stull Technologies Corp.*, the husband of a deceased former employee sued the organization, claiming that it failed to send a COBRA election notice after his wife's death. The lawsuit also alleged that the organization's notice, even if it was sent, did not define the term "qualifying event" and, because of this, the notice was inadequate and failed to provide accurate and understandable information, as required by law.

The court agreed, finding it highly unlikely that a layperson would understand the term "qualifying event" without explanation and ruling that the notice's content was inadequate. The court also noted that the organization provided no evidence of its COBRA mailing procedures, and that its HR representative had no specific recollection of mailing the notice.

Though the law does not specify the use of certified mail, the law does require employers and/or plan administrators to make a good-faith effort to see that COBRA notices reach those entitled to receive them. The court found the organization liable for the deceased employee's medical expenses.[59]

Individual insurance companies and HMOs often require that COBRA qualified beneficiaries complete additional forms. Check with your providers. If this is the case, enclose those forms and instructions for their completion with the notice.

Electing COBRA Coverage

The employee has 60 days in which to elect or waive COBRA coverage. This 60-day period is counted as 60 days from the date the qualified beneficiary would lose coverage due to the qualifying event or the date of notice, whichever is later.[60] Several non-California courts ruled that the 60-day period should not begin to run until the qualified beneficiary actually receives notice,[61] despite the impracticality of an employer knowing when that might be unless notice is sent via registered mail.

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[58] 29 C.F.R. 2590.606-4(e)

[59] *Emilien v. Stull Technologies Corp.*, 2003 U.S. App. Lexis 14515 (3rd Cir., 2003)

Though registered mail provides greater certainty, it also often delays the notice process because the addressee may not ever sign for the piece of registered mail.

In *Degrusie v. Sprint Corporation*, the Fifth Circuit Court of Appeals ruled that a good-faith effort to provide notice of COBRA rights protects an employer from liability, even if an employee never receives the notice.

The employer, Sprint, mailed a COBRA notice by certified mail and requested a return receipt. The post office made two delivery attempts to the employee, who was out of town. When he returned, the employee found a delivery notice and went to the post office to claim his mail. The post office could not locate it. Several days later the employee inquired again, but his mail was still lost. The employee never knew who sent him the mail or what it contained. The post office eventually returned the envelope to Sprint.

The employee sued Sprint for failing to give notice of his right to continue coverage under COBRA when he had medical expenses not covered by his new employer. The court ruled that COBRA only requires a good-faith effort to comply with notification requirements. The court observed that though not legally required, sending an additional copy of the notice by first class mail would have been a good practice.[62]

Minimally, you may want to add a grace period for electing COBRA equal to the estimated mailing period. Handing the COBRA notice to a departing employee during an exit interview (and getting a receipt for it) is helpful in the case of a single person being affected. But where other qualified beneficiaries exist, this would be only partially effective because the notice might not reach those other qualified beneficiaries.

Once coverage is elected, coverage must be provided from the date that coverage would have otherwise been lost, and a qualified beneficiary is generally required to make retroactive payment to cover the time elapsed during the election period before the qualified beneficiary did elect coverage.

A qualified beneficiary can waive coverage and then revoke the waiver and elect coverage if the election is made before the end of the 60-day period. The law requires no coverage for the period between the waiver and the revocation.[63]

While a COBRA election is pending and/or COBRA premiums are outstanding, a plan need not process claims if benefits are retroactively reinstated after election and payment is made. However, if a health care provider contacts the plan to confirm coverage during the election period, the plan must give a complete response as to the qualified beneficiary's COBRA rights.

For example, if COBRA has not been elected but the election period still is open, the plan should inform the provider that coverage is covered by retroactive restoration. The plan must make similar responses when premiums for any month are outstanding but still within the grace period, if that is the plan's practice. In the case of an HMO, the plan can give a qualified beneficiary under similar circumstances the option of either electing and paying for coverage or paying the reasonable and customary charges subject to future reimbursement after COBRA is elected and paid for. Alternatively, a plan can treat continued use of an HMO as a constructive election and the qualified beneficiary will be obliged to pay the premium.[64]

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60. 29 U.S.C. 1165(a)(1)

[61] *Kerr v. Chicago Transit Authority*, 1998 U.S. Dist. Lexis 2166 (N.D. Ill. 1998))

[62] *Degrusie v. Sprint Corporation*, 279 F.3d 333 (5th Cir. 2002)

[63] Treas. Reg. sec. 54.4980B-6, Q&A-4

[64] Treas. Reg. sec. 54.4980B-6, Q&A-3, 5

Second Chance Under the Trade Act of 2002

The Trade Adjustment Assistance Reform Act of 2002 created a health coverage tax credit and provided certain workers with a second chance to elect COBRA coverage. Under the Act, individuals are entitled to a second 60-day COBRA election period if they meet all of the following criteria:

- Become eligible for trade adjustment assistance (as certified by the government under the 1974 Trade Act; trade adjustment assistance is federal aid for employees displaced by increased imports of competing products from foreign countries).
- Lost their group health plan coverage because of a job loss resulting in eligibility for trade adjustment assistance.
- Did not elect COBRA during their initial election period.

The new COBRA election period begins on the first day of the month in which the individual becomes eligible for trade assistance but must be exercised within six months of the initial loss of coverage. The COBRA coverage period begins with the initial loss of coverage, so the second chance election does not increase the total period of time the individual receives COBRA coverage. In addition, there is no retroactive coverage back to the initial loss of coverage.

In addition, employees are eligible for a tax credit for COBRA premiums or the federal government will pay a percentage of the COBRA cost.

Paying for COBRA Coverage

The initial premium is due within 45 days of the date a qualified beneficiary elects COBRA coverage, retroactively paying for time elapsed during the election period.[65] The qualified beneficiary can make subsequent payments in monthly installments, due at the first of the month. However, you must provide a grace period, which is the later of:

- Within 30 days after beginning the monthly coverage period.
- The end of the allowed grace period for your payment of premiums.[66] California insurance law stipulates a 31-day grace period.

COBRA rules explicitly state that a payment is considered made on the date the payment is sent to the plan. In most cases, the postmark will show if the payment was timely.

If the qualified beneficiary makes a timely payment that is incorrect but not significantly less than the required premium, the law states that the amount paid satisfies the premium requirement unless the plan notifies the qualified beneficiary of the deficiency and provides a reasonable period to make up the deficiency (safe harbor is 30 days).

Except for a disability extension, the COBRA premium is not to exceed 102 percent of the applicable premium. The COBRA premium must be computed by you and fixed before a 12-month determination period, typically corresponding to the policy or plan year. The COBRA premiums must remain level throughout the period except under certain circumstances.

With the exception of a few situations, you cannot adjust COBRA premium rates until the beginning of the next determination year.[67]

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[65] Treas. Reg. sec. 54.4980B-8, Q&A-4

[66] Treas. Reg. sec. 54.4980B-8, Q&A-5

[67] Treas. Reg. sec. 54.4980B-8, Q&A-2

You can adjust premium rates during the determination year if:

- The qualified beneficiary is not charged the full applicable premium
- The coverage is extended due to disability
- A qualified beneficiary changes coverage, such as during an open enrollment period

COBRA Premium Shortages

The law provides a mechanism for dealing with premium shortages. If premiums are short by an insignificant amount, the plan must either:

- Create a procedure for accepting payments as payments in full
- Notify the sender that a shortage exists and provide a reasonable period for making up any deficiency

An "insignificant shortage" is defined as no more than the lesser of:

- $50
- 10 percent of the amount to be paid[68]

Unless you are willing to absorb shortages, establish a procedure that allows for immediate notification of premium shortages to qualified beneficiaries. Given that, generally, at least a 30-day grace period (considered the "safe harbor period") exists for paying premiums, in the case of a deficiency, you will be faced with extending the grace period more. You should develop an internal procedure for notifying your carriers or HMOs that you received only partial premium.

The regulations do not cover problems such as bounced checks, payments made to the wrong payee and other premium payment errors. Plan administrators can establish their own procedures for handling errors, including accepting only cash or certified checks.

COBRA Interaction With Other Laws

This section discusses how the following laws can interact with COBRA:

- Cal-COBRA
- Family and Medical Leave
- Medicare

California Extension of COBRA Coverage

California health plans must offer an enrollee who exhausted COBRA coverage the opportunity to continue coverage for up to a total of 36 months from the date the enrollee's continuation coverage began, if the enrollee is entitled to less than 36 months of continuation coverage under COBRA.[69] The offer of extended coverage can be at no more than 110 percent of the applicable rate or no more than 150 percent of the applicable rate for a qualified beneficiary determined to be disabled pursuant to Title II or Title XVI of the United States Social Security Act.

Notification of this extended coverage must be included in the notice of the pending termination of COBRA coverage, which is required to be provided to COBRA beneficiaries and included in plan documents provided to employees.

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[68] Treas. Reg. sec. 54.4980B-8, Q&A-5

[69] Health and Safety Code sec. 1366.29.

This information is included in the General Notice of COBRA Continuation Coverage Rights - California Employees.

Family and Medical Leave and COBRA

If you have 50 or more employees, you are covered by the Family and Medical Leave Act of 1993 (FMLA). The FMLA provides that certain employees may be eligible for up to 12 weeks of unpaid leave per year. The FMLA requires you to maintain health benefits for employees while on leave, but taking FMLA leave is not a qualifying event under COBRA.[70] See Chapter 18, "Family and Medical Leave," for more information on FMLA.

However, a qualifying event will occur if all of the following occur:

- The employee or dependent is covered by the plan on the day before the FMLA leave begins.
- The employee does not return at the end of the leave.
- The employee or dependents would, without COBRA coverage, lose coverage under the group health plan before what would be the maximum COBRA coverage period.[71]

For COBRA purposes, a qualifying event occurs for an employee taking FMLA leave on the last day of the FMLA leave. The last day of FMLA leave will occur on the date the employee informs you that he/she is not returning to work or the end of the maximum FMLA leave period, whichever is earlier.[72] COBRA will be triggered even if the employee chose not to maintain coverage during the FMLA leave.[73]

Note that if FMLA leave is also pregnancy disability related, the employer must continue health benefits for up to four months in a 12-month period (see "Pay and Benefits During PDL" in Chapter 19, page 526).

COBRA and Medicare Entitlement

An employee or qualified beneficiary who has a qualifying event prior to becoming eligible for Medicare must be offered COBRA benefits. COBRA can be discontinued when the employee or qualified beneficiary becomes entitled to Medicare.

An employee or qualified beneficiary already covered by Medicare at the time of the qualifying event is entitled to COBRA continuation benefits when the qualifying event occurs.

Prohibited Acts and Penalties Related to Health Care Coverage

You cannot reduce or eliminate health coverage in anticipation of a qualifying event. If you do so, the qualified beneficiary may be entitled to the benefit that would otherwise be lost. An across-the-board reduction or elimination of benefits may be seen as being done in anticipation of a qualifying event. In that situation, the law may require you to make coverage available when there is a qualifying event. Carefully document your reasons for reducing or eliminating health coverage benefits.[74]

You cannot withhold anything to which a qualified beneficiary is otherwise entitled (for example, wages or vacation pay) to compel payment for COBRA coverage or to coerce the qualified beneficiary to give up rights to COBRA coverage.[75]

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[70] Treas. Reg. sec. 54.4980B-10 Q&A-1

[71] Treas. Reg. sec. 54.4980B-10 Q&A-1

[72] Treas. Reg. sec. 54.4980B-10 Q&A-2

[73] Treas. Reg. sec. 54.4980B-10 Q&A-3

[74] Treas. Reg. sec. 54.4980B-4, Q&A-4

[75] Treas. Reg. sec. 54.4980B-6, Q&A-5

Penalties for Not Complying with COBRA

You may face penalties of $100 per day ($200 per day if more than one qualified beneficiary is affected) for each day's failure to comply with COBRA during the noncompliance period. The noncompliance period runs from the date the failure to comply with COBRA first occurs and ends either when the failure is corrected or six months after the last day of the qualified beneficiary's COBRA coverage.[76]

The overall limit on penalties for failures "which are due to reasonable cause and not to willful neglect" is $500,000; or if less, 10 percent of the amount an employer paid or incurred during the preceding taxable year for group health care plans.[77] Under ERISA, nongovernmental plan administrators face penalties of up to $110 per day for failure to provide notice of a qualifying event to a qualified beneficiary.[78]

Correcting Errors for Failing to Offer COBRA

The procedure for correcting failures to offer COBRA coverage contains no simple solutions. The IRS appears to suggest that if a failure to offer COBRA coverage occurs, the solution is to provide qualified beneficiaries with sufficient coverage to put them on the footing they would have had if COBRA coverage was offered promptly. Consult experienced benefits counsel when faced with the situation of trying to correct any COBRA compliance errors.

Cal-COBRA

The California Continuation Benefits Replacement Act of 1997 (Cal-COBRA) requires insurance carriers and HMOs to provide COBRA-like coverage for employees of smaller employers (two to 19 employees) not covered by COBRA. To be covered by Cal-COBRA, you must have employed two to 19 eligible employees on at least 50 percent of working days during the preceding calendar year. If not in business during any part of the preceding calendar year, you must have employed two to 19 eligible employees on at least 50 percent of working days during the preceding calendar quarter.

Cal-COBRA Interaction with COBRA

Larger employers (those with 20 or more employees) are also affected by Cal-Cobra. If the enrollee has exhausted his or her COBRA coverage and was entitled to less than 36 months of COBRA coverage, then California health care service plans must offer the enrollee additional continuation coverage under Cal-COBRA for a total of up to 36 months.

This information and the rate limits on Cal-COBRA must be contained in the *COBRA Continuation Election Notice – California Employees*.

COBRA Continuation Coverage Election Notice - California Employees

Example: A California enrollee exhausts his 18 months of COBRA coverage and does not qualify for any of the COBRA extensions. The enrollee may choose up to 18 months of additional coverage under Cal-COBRA.

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[76] IRS Code sec. 4980B(b)2

[77] IRS Code sec. 4980B(c)4(a)

[78] ERISA sec. 502(c)(7)

Example: A deceased employee's spouse is eligible for up to 36 months of COBRA coverage. The spouse was covered for the maximum of 36 months and would not be able to opt for Cal-COBRA coverage after COBRA coverage ends.

Cal-COBRA Qualified Beneficiary

Cal-COBRA defines a "qualified beneficiary" as any individual who, on the day before the qualifying event, is an enrollee in a group benefit plan and experiences a qualifying event.

Individuals Excluded From Cal-COBRA

Cal-COBRA does not apply to:

- Individuals entitled to Medicare benefits or who become entitled to Medicare benefits.
- Individuals with other hospital, medical or surgical coverage or who are covered by another group benefit plan, including a self-insured employee welfare benefit plan, which provides coverage for individuals and does not impose any exclusion or limitation on any existing condition of the individual, other than an existing condition limitation or exclusion that does not apply to or is satisfied by the qualified beneficiary. A group conversion option under any group benefit plan is not considered an arrangement under which an individual is covered.
- Individuals who are covered, become covered or are eligible for federal COBRA coverage.
- Individuals who are covered, become covered or are eligible for coverage pursuant to Chapter 6A of the Public Health Service Act.
- Qualified beneficiaries who fail to give notice of a qualifying event or election of continuation coverage within the specified time limits.
- Qualified beneficiaries who fail to submit the correct premium amount required in accordance with the terms and conditions of the plan contract or fail to satisfy other terms and conditions of the plan contract.

Cal-COBRA and Domestic Partners

Cal-COBRA treats registered domestic partners as qualified beneficiaries. If a registered domestic partner was a health plan participant on the day before a qualifying event, he/she would be entitled to continuation benefits.

The Cal-COBRA extension of *federal* COBRA continuation benefits would not apply to a registered domestic partner. A person must be a COBRA-qualified beneficiary to be entitled to an extension, and COBRA does not cover registered domestic partners. A registered domestic partner may be eligible to continue benefits through conversion to an individual policy.

Same-sex marriages are lawful in California.

Federal law also now recognizes that same-sex couples have a fundamental right to marry.[79] For information on federal and state coverage of same sex spouses, see "Same-Sex Spouses and Domestic Partner Benefits" on page 439.

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[79] *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015)

Cal-COBRA Qualifying Events

A "qualifying event" under Cal-COBRA means any of the following events that would result in a loss of coverage under the group benefit plan to a qualified beneficiary:

- The death of the covered employee
- The termination of employment or reduction in hours of the covered employee's employment unless terminated for gross misconduct, which does not constitute a qualifying event
- The divorce or legal separation of the covered employee from the covered employee's spouse or legal termination of a registered domestic partnership
- The loss of dependent status by a dependent enrolled in the group benefit plan
- The covered employee's entitlement to benefits under Title XVIII of the United States Social Security Act (Medicare), with respect to a covered dependent only

Cal-COBRA Notice Requirements

You must notify the plan administrator, in writing, of any employee's qualifying event within 30 days of the qualifying event.

Cal-COBRA - Notice to Carrier

You must notify qualified beneficiaries currently receiving continuation coverage of their ability to continue coverage under a new group benefit plan for the balance of the period the beneficiaries would have remained covered by the prior group benefit plan if the beneficiaries' coverage under the prior group benefit plan was set to terminate before the end of the period the qualified beneficiary would have remained covered.

Cal-COBRA - Notice to Employee

This notice must be provided either 30 days prior to the termination or when all enrolled employees receive notification, whichever is later. Plan administrators must provide you, upon written request, information necessary to assist you in giving this notice. Then you must notify the successor plan in writing of the qualified beneficiaries currently receiving continuation coverage so that the successor plan, contracting employer or administrator, may provide those qualified beneficiaries with the necessary premium information, enrollment forms and instructions.

A plan can contract with you to perform these required notifications and collect premiums. If you have agreed to an arrangement, you must notify any qualified beneficiary who has elected continuation coverage of the date that his/her coverage will terminate and notify the qualified beneficiary of any conversion coverage available. You must provide this notice during the 180-day period ending on the date that continuation coverage is terminated. This does not apply when the continuation coverage is terminated because the group contract between the plan and the employer is being terminated.

Cal-COBRA Cost

A qualified beneficiary is required to pay no more than 110 percent of the applicable rate charged for a covered employee or, in the case of dependent coverage, no more than 110 percent of the applicable rate charged to a similarly situated individual under the group benefit plan. Payments must be made on or before the due date of each payment, but not more than monthly.

If the SSA determines that the qualified beneficiary is disabled, the qualified beneficiary is required to pay the health care service plan an amount no greater than 150 percent of the group rate after the first 18 months of continuation coverage.

Cal-COBRA Length of Coverage

All qualified beneficiaries are generally eligible for continuation coverage for 36 months after the date the qualified beneficiary's benefits would otherwise have terminated.

Benefits terminate when:

- You or your successor employer or purchaser ceases to provide any group benefit plan to his/her employees.
- The qualified beneficiary moves out of the plan's service area.
- The qualified beneficiary commits fraud or deception in the use of plan services.
- The group contract between you and the plan terminates prior to the qualified beneficiary's continuation coverage termination date. In this case, coverage under the prior plan terminates and the qualified beneficiary can elect continuation coverage under the subsequent group benefit plan, if any.

Wellness Programs

Many employers make wellness programs available to employees as part of their company's overall health care benefits package. The programs often target health issues such as smoking or obesity. Employers like the programs because healthier employees translate to lower health care costs for the company, and employees like the programs because they can save money on their health care premiums.

Employers have expressed on-going concern on GINA's impact on employer-provided wellness programs. For more information on GINA, see "Genetic Information Nondiscrimination Act (GINA)" on page 135.

Financial Incentives in Wellness Programs May Violate GINA

In 2011, the Equal Employment Opportunity Commission (EEOC) issued an informal opinion letter on several issues related to workplace wellness programs. One issue the EEOC addressed was whether an employer-provided wellness program could offer financial incentives to employees to provide genetic information about themselves.

The Genetic Information Nondiscrimination Act (GINA) prohibits the use of genetic information, which includes an employee's family medical history, in making employment decisions and limits an employer's ability to request, acquire or disclose genetic information. Title II of GINA applies to employers with 15 or more employees.

One exception allows employers to acquire genetic information about an employee or his or her family members when the employer offers a health or genetic service, including a wellness program, on a voluntary basis. The employee must give written consent that he/she is voluntarily participating in the wellness program. In addition, genetic information provided to the employer can only be in aggregate form.

Financial Inducements

An EEOC opinion letter stated that employers may not specifically tie financial incentives to a requirement that employees provide genetic information to participate in the wellness program. According to the EEOC, offering this type of financial incentive violates federal GINA regulations.

In 2014, the EEOC targeted wellness programs that financially penalized employees for not participating. The EEOC alleged these penalties, such as increased health insurance premiums, rendered the wellness programs involuntary and violated GINA and the Americans with Disabilities Act. For more information on these recent EEOC charges, see "Employee Health and Wellness Programs and Disability-Related Inquiries and Examinations" in Chapter 28, page 870.

New 2016

In 2015, the EEOC published two separate Notices of Proposed Rulemaking (NPRM) describing how the ADA and GINA apply to employer wellness incentive programs that are part of group health plans. According to the EEOC, the proposed ADA rule is intended to provide guidance as to how wellness programs offered as part of an employer's group health plan can comply with the ADA and also be consistent with provisions in the Health Insurance Portability and Accountability Act (HIPAA), as amended by the Affordable Care Act.

The proposed GINA rule is also intended to address employer wellness incentive programs and limitations on gathering health information. These proposed regulations specifically address the use of wellness incentives for an employee's spouse who is covered under an employer's plan. Both of these rulemaking proposals are still pending.

Health Risk Assessment and Wellness Programs

Employers may offer a financial inducement for completing a health risk assessment that includes questions about genetic information, so long as the employer identifies the questions that are about genetic information and makes clear that the employee is not required to answer the questions about genetic information in order to receive the financial inducement.

The final GINA regulations offer an example of a health risk assessment that does not violate GINA and an assessment that does:

- **No Violation:** A covered entity offers $150 to employees who complete a health risk assessment with 100 questions, the last 20 of them concerning family medical history and other genetic information. The instructions for completing the health risk assessment make clear that the inducement will be provided to all employees who respond to the first 80 questions, whether or not the remaining 20 questions concerning family medical history and other genetic information are answered. This health risk assessment does not violate Title II of GINA.
- **Violation:** Same facts as the previous example, except that the instructions do not indicate which questions request genetic information; nor does the assessment otherwise make clear which questions must be answered in order to obtain the inducement. This health risk assessment violates Title II of GINA.

Participation in a Targeted Disease Management Program

The EEOC opinion letter reiterates that employers may offer financial incentives to encourage and guide employees who voluntarily provide genetic information (e.g. family medical history) to participate in an appropriate disease management program, only if the inducement is available to individuals whose health conditions and lifestyle risk factors make them suitable candidates, not just those who provide genetic information.

The final rule gives an example:

Employees who voluntarily disclose a family medical history of diabetes, heart disease, or high blood pressure on a health risk assessment that meets the requirements set forth above and employees who have a current diagnosis of one or more of these conditions are offered $150 to participate in a wellness program designed to encourage weight loss and a healthy lifestyle. This does not violate Title II of GINA. However, the opinion letter does not directly resolve whether there is a conflict between Title II of GINA, which applies to employers, and Title I of GINA, which applies to group health plans.

Further Information

The Employee Benefits Security Administration provides toll-free employee and employer hotlines at (866) 487-2365 and (866) 444-3272.

Chapter 18

Family and Medical Leave

The federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) provide for overlapping as well as separate leaves. FMLA/CFRA leaves, their interaction with other types of leaves of absences and their administration can be confusing and time-consuming.

This chapter explains employer obligations to employees eligible for family and medical leave under state and federal law. If a pregnant employee requests pregnancy disability leave and you have fewer than 50 employees, or an employee is not eligible for FMLA/CFRA, follow the steps outlined in Chapter 19, "Pregnancy Disability Leave (PDL)," when administering leaves related to pregnancy disability only.

California Employers are also now required to provide mandatory paid sick leave. The benefit was effective July 1, 2015. For more information, see Chapter 20, "Paid Sick Leave."

The California Fair Employment and Housing Council issued amendments to CFRA regulations, effective July 1, 2015. This chapter notes these changes throughout.

The CFRA regulations do not go into as much detail as the FMLA regulations, but where they are silent, the CFRA regulations state that they incorporate the FMLA regulations for guidance, except where the FMLA regulations might be inconsistent with CFRA.[1]

Additionally, San Francisco has also enacted a family friendly workplace ordinance that covers care for family with serious health conditions. This city ordinance is covered in much more detail in "Scheduling Requirements in San Francisco" in Chapter 6, page 116.

The following table provides a broad overview of family medical leave:

Family Medical Leave Issue	Requirement
Covered employers	If you employ 50 or more employees, you are covered by the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA).
Maximum amount of leave	FMLA and CFRA both provide a maximum of 12 weeks of leave in a 12-month period. FMLA also provides 26 weeks of leave for an employee who is the spouse, son, daughter, parent or next of kin for a covered military servicemember who requires care.
Employee eligibility	Employees are eligible if employed at a worksite with 50 or more employees in a 75-mile radius. Eligible employees must also have worked for you for 12 months (need not be consecutive) and 1,250 hours in the 12 months prior to the need for leave.

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[1] 2 CCR sec. 11096

Family Medical Leave Issue	**Requirement**
Reasons for leave	An employee can use FMLA and/or CFRA in the following circumstances: • The employee's own serious health condition (FMLA/CFRA) • A qualifying exigency relating to a close family member's military service (FMLA only) • Up to 26 weeks per 12-month period to care for an ill or injured servicemember (FMLA only) • Pregnancy-related disability (FMLA only) • Bonding with a newborn, an adopted child or a child placed in foster care with an employee (FMLA/CFRA or CFRA only) • Caring for a family member (parent, child, spouse) with a serious health condition (FMLA/CFRA) • Caring for a registered domestic partner with a serious health condition (CFRA only)
Employer responsibilities	When you learn that an employee is absent for any reason that may qualify as FMLA/CFRA, you should send a notice to the employee designating any time off related to the absence as FMLA/CFRA. There are also requirements for posters and notices, including notices relating to eligibility. Employers are prohibited from interfering with the exercise of FMLA/CFRA rights.
Ending the employment relationship before the leave expires	The employee has no greater rights than if he/she were not out on leave. The right to reinstatement would end if the employment relationship ends. However, employees on FMLA/CFRA are protected from retaliation for taking leave. Consult legal counsel before you terminate an employee on FMLA/CFRA.

Family and Medical Leave Eligibility Requirements

The following sections explain employers' obligations to provide family and medical leave for employees.

Employers Covered by Family and Medical Leave

Family and medical leave laws cover private employers with 50 or more employees on the payroll during each of any 20 or more calendar weeks in the current calendar year or the preceding calendar year. Family and medical leave laws cover all public employers, regardless of the number of employees. This includes employees on the payroll who received no compensation, part-time employees, commissioned employees and employees on leave who are expected to return to active employment. Employees on layoff do not count.

You remain covered by FMLA/CFRA even when your employee count falls below 50 employees. To lose FMLA/CFRA coverage, you must employ fewer than 50 employees for 20 workweeks in the current and preceding year. These workweeks need not be consecutive.

Employers Covered by Family and Medical Leave Without Eligible Employees

You could be covered by FMLA/CFRA, but have no employees who are eligible for FMLA/CFRA leave.

For example, assume that an employer has 30 employees in San Diego, 30 in Santa Barbara and 30 in San Francisco. Although the employer has a total of 90 employees and is a covered employer, no employees are eligible for family and medical leave because no one location has 50 employees within a 75-mile radius. The employer is still obligated to post the family and medical leave poster at each location, but can deny family and medical leave to employees.

Joint Employers Under the CFRA and FMLA

When two or more employers exercise some control over the working conditions of employees, the businesses can be joint employers, even if they are separate and distinct entities. When employees perform work that simultaneously benefits two or more employers or perform work for two or more employers during the workweek, a joint employment relationship will likely exist.[2]

The determination of whether a joint employment relationship exists is based on the totality of the entire relationship between the two employers:

- Does an agreement exist between the employers to share an employee's services or to interchange employees?
- Does one employer act directly or indirectly in the interest of another employer in relation to the employee?
- Are the employers associated in some way with respect to the employee's employment and, thus the employers are deemed to share control of the employee, directly or indirectly, because one employer controls or is controlled by or is under common control with the other employer?

For example, a company decides to hire a temporary employee through a staffing or placement agency. Whether this temporary employee should be counted for purposes of FMLA/CFRA coverage by both the company and the staffing agency generally requires analyzing whether both parties exercise some control over the temporary employee's working conditions.

Federal regulations state that "joint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer."[3]

A worker jointly employed by two employers must be counted by both employers for purposes of determining coverage and eligibility under the FMLA/CFRA, regardless of whether just one employer actually issues payment to the worker.[4]

- **Example:** A company with 40 permanent workers jointly employs 15 additional workers from a temporary placement agency. The employer would be covered by FMLA because it has now reached the 50-employee threshold.

In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA/CFRA leave and maintaining health benefits.[5] When determining which party is the primary employer, consider which party has the authority/responsibility to:

- Pay the employee
- Hire and fire the employee

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[2] 29 CFR sec. 825.106; 2 CCR sec. 11087(d)(3)

[3] 29 CFR sec. 825.106(b)(1)

[4] 29 CFR sec. 825.106(d); 2 CCR sec. 11087(e)(4)(B)

[5] 29 CFR sec. 825.106(c)

- Assign/place the employee to a worksite
- Provide employment benefits

For employees of temporary placement agencies, for example, the placement agency most commonly would be the primary employer, according to the federal regulations.[6]

Professional Employer Organizations (PEO)

A Professional Employer Organization (PEO) contracts with client employers to perform administrative functions, such as payroll, benefits, regulatory paperwork and updating employment policies. A PEO, under the FMLA/CFRA, does not create a joint employment relationship with a client organization's employees when the PEO merely performs administrative functions.[7] However, if the PEO has the right to hire, fire, assign or direct and control the client's employees or it benefits from work that employees perform, a joint employment relationship may be established.[8]

Consult legal counsel if you are unsure if you have a joint employment relationship with another organization.

Employee Eligibility for Family and Medical Leave

An employee is eligible for family and medical leave if he/she:

- Works for a covered employer
- Worked for the employer for at least 1,250 hours in the 12 months preceding the start of the leave
- Works at a worksite where the employer employs 50 or more employees either at the worksite or within 75 miles of the worksite
- Worked for that employer for at least 12 months. However, employment periods prior to a break in service of seven years or more need not be counted to determine 12 months of service for eligibility. For example, an employee worked for an employer in 2007 for five months, then returns to work for the employer in January 2016. He requests FMLA/CFRA leave for his serious health condition in August 2016. He is not yet eligible for FMLA/CFRA, because his break in service lasted longer than seven years and he has not worked for the employer for a total of 12 months.
- A break in service caused by a military service obligation or written agreement to the contrary would be excused. And nothing prevents an employer from considering employment prior to a continuous break in service of more than seven years so long as the employer does so uniformly for all employees with similar breaks in service.[9]

Requalification

If an employee is eligible for family and medical leave and takes less than the full amount of leave allowed, he/she need not re-qualify in terms of the number of hours worked to take additional leave for the same reason as the first leave. The employee also is entitled to take additional leave for the same reason as the first leave even if fewer than 50 employees now work at his/her worksite or within a 75-mile radius, and an employer may not deny the leave, cut the leave short, or deny any subsequent leave taken.

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[6] 29 CFR sec. 825.106(c)

[7] 29 CFR sec. 825.106(b)(2)

[8] Id.; 2 CCR secs. 11087(d)(3), 11096

[9] 2 CCR 11087(e)

If the additional leave is requested for a different reason than the original leave, the employee must requalify (for example, first six weeks of leave was for care of a newborn, but additional leave is requested for the employee's own illness).

Eligibility Mid-Leave

If an employee is not eligible for FMLA/CFRA leave at the start of a leave because the employee has not met the 12-month length of service requirement, the employee may nonetheless meet this requirement while out on a different type of leave entitlement. Leave to which the employee is otherwise entitled counts toward length of service (although not for the 1,250 hour requirement). The employer should designate the portion of the leave in which the employee has met the 12-month requirement as FMLA/CFRA leave.

> **Example:** An employee is injured on the job and goes out on workers' compensation leave. If the employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g., workers' compensation, group health plan benefits, etc.), the week counts as a week of employment.

Does the Employee Work at an Eligible Worksite or Within 75 Miles?

The question often arises as to how an employer can determine if it has 50 or more employees at a "worksite" or within 75 miles of the worksite.

The determination of how many employees are employed within 75 miles of the worksite is based on the number of employees maintained on the payroll. The number is determined *at the time the employee gives notice of the need for leave*. An employer may not terminate a leave that has already started if the employee count drops below 50.

An employee's "worksite" will generally be the site the employee reports to, or, if none, from which the employee's work is assigned.[10]

A worksite usually refers to a single location or a group of contiguous locations – such as a campus or industrial park. Separate buildings or areas that are not directly connected or in immediate proximity may still be a single worksite if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment. An example is given of an employer that manages a number of warehouses in a city but regularly shifts the same employees from one warehouse to another. The multiple warehouses would be considered a single worksite.

Not all employees regularly report to one worksite. Employees such as salespeople, home health care workers, telecommuters and construction workers may report to several locations. If an employee does not have a fixed worksite, the "worksite" is either:

- The site to which the employee is assigned as their home base;
- The site from which the employee is assigned work; or
- The site to which they report.

The following examples on how to determine if there are 50 or more employees within a 75-mile radius are provided by the CFRA and FMLA regulations:

- If a salesperson works from home in California but reports to and receives assignments from her corporate headquarters in New York, the New York headquarters, not her home, would constitute the worksite from which there must be 50 employees within a 75-mile radius in order for the salesperson to be eligible under the CFRA.

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[10] 29 C.F.R. sec. 825.111; 2 CCR sec. 11087(e)(4)(A)

- A construction company has headquarters in New Jersey. It opens a construction site in Ohio and sets up a mobile trailer on the site as its office for the project. The construction site in Ohio is the worksite for employees hired locally who report to the trailer daily for work assignments. But, if the company also sends job superintendents or an office manager from New Jersey to the job site in Ohio, those workers report to the New Jersey headquarters and that location is their worksite.

The 75-mile distance is measured by surface miles, using the shortest route from the facility where the employee needing leave is employed.

New 2016

When an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee is assigned or reports. If the employee has physically worked for at least one year at a facility of a secondary employer, however, the employee's worksite is that of the secondary employer. The employee is also counted by the secondary employer to determine CFRA eligibility for the secondary employer's employees.[11]

FMLA and Flight Crews

The Airline Flight Crew Technical Corrections Act amends the FMLA to ensure that pilots and flight attendants qualify for FMLA benefits to the same extent as other U.S. employees.

To account for the airline industry's unconventional timekeeping practices, the act amended Section 101(2) of the FMLA to allow a flight attendant or flight crewmember to meet the hours of service requirement if he/she worked or was paid for the following:

- At least 60 percent of the applicable total monthly guarantee, or the equivalent for the previous 12-month period for or by the employer from whom leave is requested.
- A minimum of 504 hours, not counting personal commute time, time spent on vacation leave or medical or sick leave, during this period.

The law also authorizes the Secretary of Labor to provide, by regulation, a method for calculating leave for airline flight crew. It also requires each employer of flight attendants or crewmembers to maintain on file with the Department of Labor information specifying the applicable monthly guarantee about each category of employee to which the guarantee applies. It is up to the Secretary of Labor to issue any implementing regulations.

FMLA and CFRA Qualifying Reasons

An employee can take family and medical leave under several different circumstances. Some of these circumstances are FMLA only, some are CFRA only, and some are FMLA/CFRA combined.

Family Care (FMLA/CFRA)

FMLA and CFRA both allow leave for the purpose of caring for a family member with a serious health condition. For information on the definition of "serious health condition," see "Definitions of Terms Used in Family and Medical Leave" on page 477.

FMLA and CFRA both allow leave to care for a parent, spouse or child, as defined. In addition, CFRA allows leave to care for a registered domestic partner.

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[11] 29 CFR 825.111(a)(3); 2 CCR sec. 11087(e)(4)(B)

Parent

A biological, foster or adoptive parent; a stepparent; a legal guardian; or other person who stood *in loco parentis* to the employee when the employee was a child. A biological or legal relationship is not necessary for a person to have stood *in loco parentis* to the employee as a child. Parent does not include a parent-in-law.

Spouse

A partner in marriage. It does not include unmarried people living together, but does include people who are legally married who do not live together.

Same-sex marriages are lawful in California[12] and are also now lawful in all 50 states.[13] An employee may take leave under FMLA or CFRA to care for a same-sex spouse with a serious health condition.

Spouse under CFRA is specifically defined as including registered domestic partners and same-sex partners in marriage.[14]

Spouse under the FMLA is also defined to now include same-sex spouses. Spouse under the FMLA means a husband or wife as defined or recognized in the state where the individual was married and includes individuals in same-sex marriages or common law marriages. Spouse also includes a husband or wife in a marriage that was validly entered into outside of the United States, if the marriage could have been legally entered into in at least one state. This revised definition of spouse to include same-sex marriages was the result of a final rule implemented by the federal Department of Labor in 2015.

The U.S. Supreme Court ruled on June 26, 2015, that same-sex couples have a constitutional right to marry in all 50 states and every state must recognize same-sex marriages lawfully licensed and performed out-of-state.[15] As a result, same sex marriages are legally valid in the United States and must be recognized as such for purposes of FMLA. Visit the DOL's FMLA page, at http://www.dol.gov/whd/fmla/spouse/, for updated information.

Employers must allow employees to take FMLA leave to care for their same-sex spouse with a serious health condition, for a qualifying exigency and for other qualifying reasons.

Registered Domestic Partner (CFRA)

CFRA allows an employee to take leave to care for a registered domestic partner with a serious health condition (for more information, see "Registered Domestic Partnership" in Chapter 26, page 729). FMLA does not cover registered domestic partners.

Child

A biological, adopted or foster son or daughter; a stepson or stepdaughter; a legal ward; or a child of an employee who stands *in loco parentis* to that child. A child must be either under 18 years of age or an adult dependent child. The legal term "*in loco parentis*" means in place of a parent, and a person standing *in loco parentis* is charged with a parent's rights, duties and responsibilities. It does not require a biological or legal relationship.

The U.S. Department of Labor (DOL) issued an Administrator's Interpretation clarifying the definition of "son or daughter" with regard to an employee standing *in loco parentis* to a child. The DOL's interpretation is not a regulation and does not carry the weight of the law or regulations implementing the law. If you are in doubt about the standing of an employee who wants to take leave under FMLA, consult legal counsel before denying the leave.

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[12] *Hollingsworth v. Perry*, 130 S.Ct. 705 (2013)

[13] *Obergefell v. Hodges*, 133 S.Ct. 2584 (2015)

[14] 2 CCR sec. 11087(r)

[15] *Obergefell v. Hodges*, 133 S.Ct. 2584 (2015)

The current FMLA regulations define "*in loco parentis*" as including "those with day-to-day responsibilities to care for and financially support a child," or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.[16]

The DOL interprets the regulations to mean that an employee who intends to assume the responsibilities of a parent (*in loco parentis*) is not required to establish that he/she provides both day-to-day care and financial support. Either day-to-day care or financial support can establish the relationship. The interpretation states that the FMLA statute and regulations do not restrict the number of parents a child can have under the FMLA.[17]

Medical Care for the Employee (FMLA/CFRA)

Both FMLA and CFRA allow for leave for the employee's own serious health condition. This means an employee's own serious health condition that makes the employee either unable to work at all or unable to perform one or more essential functions of his/her job. For information on the definition of "serious health condition," see "Definitions of Terms Used in Family and Medical Leave" on page 477.

Medical Care for the Employee's Pregnancy Related Disability (FMLA Only)

Pregnancy related disabilities are covered as serious health conditions under the FMLA, but not under CFRA.[18] This may lead to additional leave entitlements under California law. For more information, see "Pregnancy and Family and Medical Leave" on page 501.

Baby Bonding (FMLA/CFRA)

FMLA and CFRA both allow leave for the purposes of bonding with a newborn, an adopted child or a child placed in foster care with an employee. This includes leave for an employee, either male or female, to bond with his/her own child or with his/her adopted or foster child.

All leave for baby bonding must conclude within one year of the birth of the child or one year from the date the child was placed with the employee for adoption or foster care.

FMLA runs concurrently with state pregnancy disability leave (PDL); but CFRA does not. An employee who has exhausted PDL/FMLA for their pregnancy related disability may be entitled to an additional 12 weeks of CFRA only baby bonding leave. For more information see "Pregnancy and Family and Medical Leave" on page 501.

For restrictions where both parents work for the same employer, see "Duration and Timing of Family and Medical Leave" on page 494 and "Leave When Parents Work for the Same Employer" on page 504.

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[16] [illegible]

[17] [illegible] e 22, 2010. Note: The full text of the Administrator's Opinion is available for download [illegible]

[18] [illegible]

Leave for a Qualifying Exigency (FMLA Only)

FMLA allows for 12 weeks of leave in a 12-month period because of any "qualifying exigency" arising out of the foreign deployment of that the employee's spouse, child or parent. This is FMLA only leave; there is no corresponding CFRA entitlement.

Side-by-Side Comparison of 2008 - Final 2013 FMLA Regulations

There are specific eligibility requirements for qualifying exigency leave. In order for the employee to take the leave:

- The employee's spouse, child or parent must be a member of the Armed Forces (including the National Guard and Reserves); and
- The member must be on covered active duty status, call to covered active duty status or notified of an impending call or order to covered active duty. "Covered active duty" means:
  - For members of the Regular Armed Forces — duty during the deployment of the member with the Armed Forces to a foreign country.
  - For members of a Reserve component of the Armed Forces (members of the National Guard and Reserves) — duty during the deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in support of a contingency operation.

The type of events that count as "qualifying exigencies" for which an employee may take FMLA leave, include the following:

- Short notice deployment — a period of up to seven calendar days may be taken to address any issue arising from a short-notice deployment (i.e., deployment with seven or less days of notice)
- Military events and related activities — official events or family support or informational briefings
- Childcare and school related activities — including arranging for alternative childcare, providing childcare on an urgent basis, enrolling or transferring schools or day care, attending school or daycare meetings
- Financial and legal arrangements
- Counseling
- Parental care activities — time needed to care for a military member's parent who is incapable of self-care, such as arranging for alternative care and providing care on an immediate basis
- Rest and recuperation — Eligible employees may take up to fifteen calendar days of leave to spend time with a covered military member on short-term, temporary, rest and recuperation leave
- Post-deployment activities — military sponsored arrival or reintegration briefings (within 90 days of end of covered active duty) and to address issues relating to death of a servicemember
- Additional activities — any other event that the employee and employer agree is a qualifying exigency

Qualifying exigency leave is only covered under FMLA, but not under CFRA. This may lead to additional leave entitlements under California law. For more information, see "Leave Interactions" on page 499.

Military Caregiver Leave (FMLA Only)

FMLA also provides eligible employees up to 26 weeks per single 12-month period to care for an ill or injured covered servicemember with a serious injury or illness. Military caregiver leave under FMLA differs from the other FMLA leaves and from CFRA. It:

- Allows for 26 weeks versus 12 weeks
- Covers more family members
- Allows for leave to care for family members with "serious injuries or illnesses," as opposed to FMLA/CFRA's "serious health condition"
- Contains different certification requirements.

There is no corresponding CFRA entitlement. However, there may be situations where CFRA would run concurrently and cover the first 12 weeks of that leave.

Side-by-Side Comparison of 2008 - Final 2013 FMLA Regulations

The employee seeking military caregiver leave must be related to the covered servicemember in one of the following ways:

- Spouse
- Child
- Parent
- Next of kin (not covered by CFRA)

A covered servicemember, for whom employees can take up to 26 weeks of FMLA, is either:

- A current member of the Armed Forces (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is in outpatient, or is on the temporary disability retired list, for a serious injury or illness. For the definition of "serious injury or illness" of a current servicemember, see "Definitions of Terms Used in Family and Medical Leave" on page 477.
- A veteran of the Armed Forces (including a member of the National Guard or Reserves) discharged within the five year period before the family member first takes military caregiver leave to care for the veteran and who is undergoing medical treatment, recuperation, or therapy for a qualifying serious injury or illness. A veteran who was dishonorably discharged is not a covered servicemember. For the definition of "serious injury or illness" of a veteran, see "Definitions of Terms Used in Family and Medical Leave" on page 477 .

Military caregiver leave under FMLA is only partially covered under CFRA. CFRA would apply only to those leaves where the servicemember is also in a CFRA qualifying relationship with the employee requesting the leave (i.e., spouse, child or parent), and the servicemember's qualifying illness or injury also meets the definition of a serious health condition under CFRA.

If these conditions are met, CFRA would run concurrently with FMLA military caregiver leave for 12 weeks out of the total 26 weeks. For instance, if the military caregiver leave is to care for the serious health condition of a spouse, then CFRA would run concurrently and cover the first 12 weeks of that leave. For information on calculating the 26 weeks of leave, see "Calculating Weeks for Leave" on page 480.

Only FMLA would apply for military caregiver leaves for "next of kin" family members, for serious injuries or illnesses that do not meet the CFRA definition and for leave beyond 12 weeks. If the military caregiver leave is taken for next of kin, and thus there is no CFRA coverage, the employee would still have 12 weeks of CFRA leave for other CFRA-qualifying reasons. For more information, see "Leave to Care for an Ill or Injured Servicemember" on page 502.

Definitions of Terms Used in Family and Medical Leave

An employee can take medical leave for his/her own "serious health condition." An employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember can also take military caregiver leave for the "serious injury or illness" of the covered servicemember.

'Serious Health Condition' Defined

An employee may use FMLA/CFRA leave for his/her own serious health condition. He/she may also use family and medical leave to care for a child, parent or spouse who has a serious health condition.

An employee may use CFRA-only leave to care for a registered domestic partner who has a serious health condition.

A "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves either "inpatient care" or continuing treatment. "Continuing treatment" is ongoing medical treatment or supervision by a health care provider.

A serious health condition may involve one or more of the following:

(1) Hospital Stay

"Inpatient care" in a hospital, hospice or residential health care facility, any subsequent treatment in connection with such inpatient care, or any period of incapacity. FMLA requires an overnight stay in the facility,[19] while under CFRA, the "inpatient care" criteria is met if the health care facility admits the employee (or CFRA-covered family member) to the facility with the expectation that the person will remain at least overnight and occupy a bed, even if it later develops that the person can be discharged or transferred to another facility and thus does not actually stay overnight.[20]

(2) Absence Plus Treatment

A period of "incapacity." The incapacity must be more than three consecutive calendar days, including any subsequent treatment or period of incapacity relating to the same condition. The incapacity must also involve:

- Treatment two or more times by a health care provider (for FMLA only, the two treatments must occur within 30 days*), by a nurse or physician's assistant under direct supervision of a health care provider or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider.
- Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.
- *For FMLA only, the employee's first treatment must occur within seven days of the first day of incapacity.

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[19] [illegible]

[illegible]

California law does not include the noted time limitations. If a leave is FMLA/CFRA, follow the California law without the time limitations.

(3) Chronic Conditions Requiring Treatment

A chronic condition that:

- Requires periodic visits (for FMLA only, "periodic" means at least two times per year) for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider.
- Continues over an extended period of time (including recurring episodes of a single underlying condition).
- May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(4) Permanent or Long-Term Conditions Requiring Supervision

A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke or the terminal stages of a disease.

(5) Multiple Treatments (Non-Chronic Conditions)

Any period of absence to receive multiple treatments (including any period of recovery) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention treatment, such as cancer (chemotherapy, radiation, etc.) severe arthritis (physical therapy), kidney disease (dialysis).

(6) Treatment for Substance Abuse

(7) Pregnancy

A period of incapacity due to pregnancy, or for prenatal care. Note: An employee's own incapacity due to pregnancy is covered as a serious health condition under FMLA **but not under CFRA**.

What Does Not Qualify as a FMLA-Qualifying "Treatment" and "Serious Health Conditions"

The federal FMLA regulations specify that treatment does not include:

- Routine physical examinations
- Eye examinations
- Dental examinations

For purposes of the FMLA, the following do not establish a regimen of continuing treatment:

- Taking over-the-counter medications, such as aspirin and antihistamines, or using salves
- Bed rest
- Drinking fluids

- Exercise
- Other similar activities that can be initiated without a visit to a health care provider

The FMLA regulations specify that "serious health conditions" do not include the following for purposes of FMLA, unless hospital care or complications develop:[21]

- Cosmetic surgery
- The common cold
- The flu
- Earaches
- Upset stomach
- Minor ulcers
- Headaches (other than migraines)
- Routine dental or orthodontia problems
- Periodontal disease

Serious Illness or Injury Defined for Military Caregiver Leave

An employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember (including certain veterans) can take military caregiver leave for the "serious injury or illness" of the covered servicemember. See "FMLA and CFRA Qualifying Reasons" on page 472.

The FMLA definitions of "serious injury or illness" for current servicemembers and for veterans are different from the FMLA and CFRA definition of "serious health condition." See "'Serious Health Condition' Defined" on page 477 to determine if the covered servicemember's "serious illness or injury" will also qualify as a CFRA "serious health condition."

Current Servicemembers

A serious injury or illness for a current servicemember is:

- An injury or illness that was incurred in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating; or
- An injury or illness that existed before the servicemember's active duty and that was aggravated by service in the line of duty on active duty in the Armed Forces.

Covered Veterans

A serious injury or illness for a covered veteran is:

- An injury or illness that was incurred in the line of duty on active duty in the Armed Forces; or
- An injury or illness that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces.

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[21] 29 CFR sec. 825.113

To qualify, the injury or illness must also meet one of the following four definitions:

1. A continuation of a serious injury or illness that was incurred or aggravated when the veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank or rating; or
2. A physical or mental condition for which the veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and the need for military caregiver leave is related to that condition; or
3. A physical or mental condition that substantially impairs the veteran's ability to work because of a disability or disabilities related to military service, or would do so absent treatment; or
4. An injury that is the basis for the veteran's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

Any one of these definitions meets the FMLA's definition of a "serious injury or illness" for a covered veteran regardless of whether the injury or illness manifested before or after the individual became a veteran.

Calculating Weeks for Leave

"Twelve weeks" means the equivalent of twelve normally scheduled workweeks. For eligible employees working more or less than five days a week or working alternative work schedules, the number of working days constituting 12 weeks is calculated on a pro rata or proportional basis.

- For a full-time employee working five, eight-hour days per week, 12 workweeks means 60 working eight-hour days of leave entitlement.
- For an employee working half-time, 12 workweeks can mean 30 eight-hour days, 60 four-hour days or 12 workweeks of whatever is the employee's normal half-time work schedule.
- For an employee who normally works six eight-hour days, 12 workweeks means 72 working eight-hour days of leave entitlement.
- If the employee's schedule is so variable from week to week that it is impossible to determine how many hours an employee would be expected to work if the employee did not take FMLA/CFRA leave, then a weekly average of the hours the employee was scheduled to work over the 12 months prior to the beginning of the leave period (including any hours the employee took leave of any type) should be used to calculate the employee's leave entitlement.[22]

If an employee takes leave on an intermittent or reduced work schedule, only the amount of leave actually used can be counted toward the 12 weeks of leave. For example, if an employee needs physical therapy that requires him/her to be absent from work two hours per week, only those two hours can be charged against the employee's family and medical leave entitlement.

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[22] [illegible]

Required Overtime

If an employee is normally required to work overtime, but can't because of a FMLA/CFRA-qualifying reason limiting that employee's ability to work overtime, the hours the employee would have been required to work can be counted against the employee's FMLA/CFRA entitlement as intermittent or reduced schedule leave.

Example: An employee is normally required to work 48 hours per week. Because of a serious health condition, the employee can only work 40 hours per week. The other eight hours can be taken, and counted, as CFRA leave.

Voluntary Overtime

Voluntary overtime hours that an employee does not work due to a serious health condition cannot be counted against the employee's CFRA leave entitlement.

Schedule Changes

If an employer has made a permanent or long-term change to the employee's schedule (for reasons other than FMLA/CFRA, and prior to the employee notice of need for FMLA/CFRA leave), the hours worked under the new schedule should be used for making the calculation.

Family and Medical Leave Calculation Methods

You can choose any one of the following methods for determining the 12-month period in which the 12 workweeks of leave entitlement occurs:

- Method One — The calendar year.
- Method Two — Any fixed 12-month leave year, such as a fiscal year, or a year starting on an employee's anniversary date.
- Method Three — The 12-month period measured forward from the date an employee's first family leave begins.
- Method Four — A rolling 12-month period measured backward from the date an employee uses any family leave.

Under methods one and two, an employee is entitled to up to 12 workweeks of family leave at any time in the fixed 12-month period selected. An employee could take 12 workweeks of leave at the end of the year and 12 workweeks at the beginning of the following year, creating the potential for 24 straight workweeks of leave.

Example: If the employer uses a calendar year or other fixed 12-month period (a fiscal year or an anniversary year, for example) the employee can use up to 12 weeks of FMLA and/or CFRA during that 12-month period. An employer uses a fiscal year of June 1 through May 31 as the 12-month period. An employee uses 12 weeks in March, April and May of 2015. On June 1, 2015 (the beginning of the new fiscal year and new 12-month period for FMLA), the employee again has up to 12 weeks of FMLA and/or CFRA leave available.

Under method three, an employee is entitled to 12 workweeks of leave during the year beginning on the first date family leave is taken; the next 12-month period begins the first time family leave is taken after completion of any previous 12-month period.

> **Example:** The employer uses the 12-month period measured forward from the date the employee's leave first begins. An employee takes four weeks of FMLA/CFRA beginning on August 1, 2015. The employee can use up to an additional eight weeks of FMLA/CFRA during the rest of the 12-month period — which will end on July 31, 2016. If the employee used all 12 weeks beginning on August 1, 2015, all FMLA/CFRA would have been exhausted until August 1, 2016.

Under method four, each time an employee takes family and medical leave, the remaining leave entitlement is any balance of the 12 workweeks not used during the immediately preceding 12 months.

> **Example:** The employer uses the rolling 12-month period measured backward from the date an employee uses any FMLA/CFRA leave. The employee uses four workweeks beginning February 1, 2015; four workweeks beginning June 1, 2015; and four workweeks beginning December 1, 2015. The employee is not able to take additional FMLA/CFRA leave until February 1, 2016, at which time the employee can use four weeks of FMLA/CFRA. The next time the employee will be eligible for more leave is June 1, 2016, when up to four weeks of leave is again available.

Apply whatever method you choose consistently and uniformly to all employees. If an employer fails to select one of the four methods for measuring the 12-month period, the method that provides the most beneficial outcome for the employee will be used.[23]

Calculation Method for Military Caregiver Leave

For leave to care for an ill or injured covered servicemember, the employee can take up to 26 workweeks in a single 12-month period under the FMLA. For this military caregiver leave, the 12-month period begins on the first day of leave, regardless of how you calculate the 12-month period for other FMLA/CFRA leaves.

If the employee does not take the entire 26 weeks of leave entitlement within the 12-month period, the employee forfeits the remaining amount of leave available.[24]

Calculation Method for Flight Crews

A special method for calculating leave usage exists for airline flight crews. An airline flight crew employee is entitled to 72 days of leave during any 12-month period for FMLA-qualifying reasons other than military caregiver leave and 156 days of leave during a single 12-month period for military caregiver leave.

The regulations also provides that, if an airline flight crew employee takes leave intermittently or on a reduced schedule, the employer must account for the leave using an increment no greater than one day.[25] See "Intermittent Leave" on page 494 for a discussion of where it is physically impossible for an employee, such as a flight crew member using intermittent leave or working a reduced leave schedule, to commence or end work mid-way through a shift.

[illegible]

[illegible]

[illegible]

Family and Medical Leave Calculation Method Notification

Explain the calculation method you choose in the FMLA/CFRA policy in your employee handbooks. If you do not clearly explain your calculation method to employees, you must give them whichever method provides the most family and medical leave time, as courts will apply the option most favorable to the employee.[26]

Under both FMLA and CFRA regulations, an employer that wants to change to another alternative is required to give at least 60 days' notice to all employees. The transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. A new method cannot be implemented to avoid FMLA's leave requirements under any circumstances.

In *Bachelder v. America West Airlines*, America West terminated an employee, in part, for taking too much leave after exhausting her FMLA entitlement for a rolling 12-month period. The Ninth Circuit Court of Appeals concluded that America West's handbook policy, which stated that "employees are entitled to up to twelve calendar weeks of unpaid FMLA leave within any twelve month period," did not sufficiently communicate the fact that America West uses the rolling method for calculating an employee's eligibility for leave. The Ninth Circuit sent the case back to the lower court with instructions to calculate the employee's leave under the calendar year method. This method gave the most benefit to the employee because, under this calculation, the employee's leave was protected under the FMLA and the termination violated the FMLA's provisions.[27]

Holidays During Leave

If a holiday falls within a week used as family and medical leave, the week is counted as a week of family and medical leave.[28] However, if an employee uses FMLA/CFRA leave in increments of less than one week, the holiday will not count against the employee's FMLA/CFRA leave unless the employee was otherwise scheduled and expected to work during the holiday.

If your business activity temporarily ceases and employees generally are not expected to report for work for one or more weeks (e.g., a school closing two weeks for the Christmas and New Year holidays or the summer vacation or an employer closing the plant for retooling or repairs), the days your activities have ceased do not count against the employee's FMLA/CFRA leave entitlement.

Employees on unpaid FMLA/CFRA leave usually do not receive holiday pay if they are not working on the holiday. If your policy pays holiday pay during other leaves of absence, you should pay holiday pay during FMLA/CFRA.

If an employee is on paid FMLA/CFRA leave, follow your policy regarding holiday pay during a paid leave.

Certification for Family and Medical Leave

You can require medical certification for an employee taking family and medical leave for his/her own serious illness or to care for a family member, except for baby-bonding time.

Keep in mind that medical privacy laws limit the type of information you can require on this certification. The medical certification forms provided by the U.S. Department of Labor (DOL) request medical facts to support the certification, including a diagnosis of a patient or family member's serious health condition. However, California law prohibits the release of a medical diagnosis supporting certification, unless the patient signs a valid waiver of his/her right to privacy.

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[26] *Bachelder v. America West Airlines*, 259 F.3d 1112 (9th. Cir 2001)

[27] *Bachelder v. America West Airlines*, 259 F.3d 1112 (9th Cir. 2001)

[28] 29 CFR sec. 825.200(h); 2 CCR sec. 11090(c)(3)

The *Certification of Health Care Provider - Employee's or Family Member's Serious Health Condition* form is appropriate for use in California. The DOL forms are not appropriate for use for CFRA/FMLA leave. Instead, these forms have been adapted to comply with California law. The *Certification of Health Care Provider for PDL, Transfer, And/Or Reasonable Accommodation* form is appropriate for employees taking pregnancy disability leave running concurrently with FMLA leave.

Certification of Health Care Provider - Employees or Family Members Serious Health Condition

Certification of Health Care Provider - Employees or Family Members Serious Health Condition - Spanish

Certification of Health Care Provider for PDL, Transfer, And/Or Reasonable Accommodation

Medical certification for a family and medical leave purpose means a written communication from the health care provider of the child, parent, spouse, registered domestic partner or employee with a serious health condition that the health care provider's patient has a serious health condition.

A "health care provider" is a physician, surgeon, nurse practitioner, nurse-midwife, or other person capable of providing health care services. The health care provider can be licensed either in the United States or in any other country.

FMLA regulations specify that "others capable of providing health care services" include only podiatrists, dentists, clinical psychologists, optometrists and chiropractors.[29] The CFRA regulations follow FMLA's definition.

Medical Leave for the Employee's Own Serious Health Condition

As a condition of granting leave, the employer may require certification of the serious health condition.

New 2016

The certification need not identify the serious health condition involved. In fact, the new certification form provided in the revised California regulations does not contain a space for identifying the underlying condition. The employee may identify the serious health condition, if he/she chooses. The certification must contain:

- The date, if known, that the serious health condition came into existence
- The probable duration of the condition
- A statement that, due to the serious health condition, the employee is unable to work at all or is unable to perform any one or more of the essential functions of his/her position[30]

Certification provisions in both the FMLA and CFRA regulations allow employers to ask whether the employee can perform the essential functions of his/her position and, where applicable, the medical necessity of intermittent leave.[31]

When the leave is for the employee's own serious illness or injury, it is recommended that you attach a copy of the employee's job description to the request for medical information from the health care provider. Alternatively, you can provide a list of the essential functions of the position for the medical provider.

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[29] 29 CFR sec. 825.125(b); 2 CCR sec. 11087(j)(2)

[30] 2 CCR secs. 11087(a(2) and 11097

[31] 29 CFR sec. 825.306(a); 2 CCR secs. 11087(a)(2) and 11097

The employer may not ask the employee to provide additional information (e.g., symptoms, diagnosis, etc.) in the medical certification beyond what is allowed for by the law. The employer is responsible for complying with confidentiality of medical information laws.

Family care leave for the employee's child, parent or spouse — the certification need not identify the serious health condition involved, but must contain:

- The date, if known, that the serious health condition came into existence.
- The probable duration of the condition.
- An estimate of the amount of time the health care provider believes the employee must care for the child, parent, spouse or domestic partner.
- A statement that the serious health condition warrants the participation of the employee to provide care during a period of treatment or supervision of the child, parent, spouse or domestic partner, including providing psychological comfort and arranging third-party care for the child, parent, spouse or domestic partner and directly providing, or participating in, the medical care.

Medical leave for the serious injury or illness of a covered servicemember — one of your employees may request leave under the FMLA to care for a covered servicemember. Different information is needed depending on whether the request is for a current servicemember or for a veteran. The *Certification for Serious Injury or Illness of a Current Servicemember - for Military Family Leave - Family Medical Leave Act* and the *Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave - Family Medical Leave Act* forms are appropriate for use in California.

Certification for Serious Injury or Illness of a Current Servicemember - for Military Family Leave - Family and Medical Leave Act

Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave - Family and Medical Leave Act

The list of health care providers that may complete a certification for covered servicemembers includes:

- A United States Department of Veterans Affairs ("VA") health care provider
- A Department of Defense (DOD) TRICARE network authorized private health care provider
- A DOD non-network TRICARE authorized private health care provider
- A health care provider as defined for other types of FMLA leave (such as leave to care for one's own serious health condition)

Qualifying exigency leave — an employee might seek FMLA leave due to a qualifying exigency relating to a covered military member's active duty or call to active duty status. An employer can request information supporting the need for this leave. Required information can include a copy of the military member's covered active duty orders or other documentation from the military showing active duty or impending call to active duty. If leave is needed to meet with a third party, such as to arrange for childcare, the certification can request verifying information. The *Certification of Qualifying Exigency for Military Family Leave - FMLA Only* form is appropriate for use in California.

Certification of Qualifying Exigency for Military Family Leave - FMLA only

Timeliness of Medical Certification

You can require the employee to provide medical certification within no less than 15 calendar days of the employer's request for certification. However, if it is not possible for the employee to do so despite his/her good-faith efforts, the leave can begin before you receive the certification.

Absent extenuating circumstances, such as the health care provider being unavailable, failure to return the certification in a timely manner can result in denial of FMLA/CFRA protections following the expiration of the 15-day time period until a sufficient certification is provided. If the employee never provides the certification, the leave is not protected family and medical leave.

At the time you request certification, you need to advise the employee of the consequences that will occur if he/she fails to provide adequate certification.

You can terminate an employee who refuses to provide the required medical certification and remains absent from work. Apply a consistent process in dealing with unauthorized absences from work.[32]

You can require the employee to obtain recertification at the end of the period that the health care provider originally estimated the employee needed for family leave, but only if additional leave is requested.

Validity of Medical Certification

Under CFRA regulations, an employer can never ask an employee for a diagnosis of the employee's serious health condition or that of a family member.[33]

Both FMLA and CFRA regulations provide that an employer may contact a health care provider to authenticate a medical certification but for no other reason, including requesting additional medical information.[34]

FMLA regulations authorize employers to get second and third medical opinions about the serious health condition of a family member.[35] However, California law does not allow you to request more information even if you doubt the validity of the medical certification for an employee needed to care for a family member. You must accept the certification.

Employers should not request second and third medical opinions for leave to care for family members if the leave is CFRA or FMLA/CFRA.

If you have good faith, objective reasons to doubt the validity of the medical certification for an employee taking leave for his/her own serious health condition, California law permits an employer to require the employee to obtain the opinion of a second health care provider about any information in the certification. You can designate or approve the second provider. You must bear the expense of obtaining the second opinion. However, you cannot employ your designated or approved health care provider that you employ on a regular basis. And, the employer may not ask the employee to provide additional information in the medical certification not allowed by the CFRA regulations, such as the patient's diagnosis.

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[32] *Bailey v. Southwest Gas Company*, 275 F.3d 1181 (9th Cir. 2002)

[33] 2 CCR secs. 11091(b)(2)(A)(1), 11097

[34] 29 CFR sec. 825.307(a); 2 CCR secs. 11091 (b)(1) - (2)

[35] 29 CFR sec. 825.307

If the second opinion differs from the opinion in the original certification, you can require, at your expense, that the employee obtain the opinion of a third health care provider about any information in the certification. You and the employee jointly designate or approve the third provider. The third health care provider's opinion is final and is binding to both you and the employee.

Remember that any medical information you receive is covered by confidentiality laws. Retain this information in a confidential medical file separate from the employee's regular personnel file. See "Keeping Medical Information Private" in Chapter 8, page 133, for more information.

Notice Requirements for Employer and Employee

State and federal laws create specific posting and notice obligations for employers to explain employees' family and medical leave rights.

Employers may require employees to provide advance notice before FMLA/CFRA leaves begin.

Employer Requirements

Employers have both posting and notice obligations. Use the following forms to assist you with your documentation requirements:

FMLA CFRA Documentation Checklist - For Employer Use Only

PDL FMLA CFRA Documentation Checklist - For Employer Use Only

Basic Poster and Notice Requirements under the Family Medical and Pregnancy Leave Laws

Basic Poster and Notice Requirements under the Family Medical and Pregnancy Leave Laws - Spanish

Posting Requirements

You must post general family and medical leave notices in a conspicuous place where applicants and employees tend to congregate. There are two separate general notices; one for the federal FMLA and one for the state CFRA. Both describe employees' rights to leave under these laws.

Federal Family and Medical Leave Act Poster

Federal Family and Medical Leave Act Poster - Spanish

Family Care and Medical Leave and Pregnancy Disability Leave - Notice B - 50 or More Employees

Family Care and Medical Leave and Pregnancy Disability Leave - Notice B - 50 or More Employees -Spanish

Electronic posting of CFRA and FMLA information is sufficient to meet the posting requirement as long as it otherwise follows the rules detailed here. If you are a covered employer, the notice must still be posted even if you do not have any eligible employees.

FMLA regulations require employers to provide all notices relating to FMLA leave in the language in which a significant portion of the workforce is literate.[36] California law states that if the workforce at any facility or establishment contains 10 percent or more of people who speak a language other than

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[36] 29 CFR sec. 825.300(a)

English as their spoken language, you must translate the posters and notices for those employees into every language that is spoken by at least 10 percent of the workforce.[37]

The poster and text must be large enough to be legible and easily read.

Distribution of Notice and Employee Handbook Requirements

The state and federal notices should be distributed to new and current employees and also incorporated into employee handbooks.

Under federal law, the information is required to be incorporated into an employee handbook or other written guidance to employees concerning employee benefits or leave rights. If such written materials do not exist, the notice should be distributed at the time of hire. The employer can either simply hand out a duplicate of the federal notice or use a similar format as long as it contains all of the information in the federal notice.[38] The FMLA authorizes electronic posting of this information.

Under California law, if you publish an employee handbook that describes other kinds of personal or disability leaves available to your employees, you must include a description of family and medical leave in the next edition of your handbook.[39] Make sure you include the method that you use for calculating leave eligibility in your employee handbook. See “Calculating Weeks for Leave” on page 480 for more information.

You may include both PDL and family and medical leave requirements in a single notice.

The state regulations also provide that employers are encouraged to:[40]

- Give a copy of the California notice to each current and new employee
- Ensure that copies are otherwise available to each current and new employee
- Disseminate the notice in any other way, including electronically

Notice of Eligibility and Rights and Responsibilities

When an employee requests FMLA/CFRA leave or when you learn that an employee’s leave may be for a FMLA/CFRA qualifying reason, you must notify the employee of his/her eligibility to take FMLA/CFRA leave and of his/her rights and responsibilities within **five business days**, absent extenuating circumstances.[41]

The *FMLA - Notice of Eligibility and Rights and Responsibilities* must state whether the employee is eligible for leave. If the employee is not eligible for FMLA/CFRA leave, the notice must state at least one reason why. For example, the notice may inform the employee that he or she is ineligible because the employee worked less than 1,250 hours in the preceding 12 months.

If the employee is not yet eligible for FMLA/CFRA and the leave request is related to pregnancy, use *Pregnancy Disability Leave - Notice A*. For more information, see “Employer Posting and Notice Requirements for PDL” in Chapter 19, page 519.

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[37] 2 CCR sec. 11096(c)
[38] 29 CFR sec. 825.300(a)
[39] 2 CCR sec. 11096(a)
[40] 2 CCR sec. 11096(b)
[41] 29 CFR sec. 825.300

Any requirement for medical certification or certification of a qualifying exigency must be specified in the notice, along with the consequences for failing to provide the required certification.

The notice must also detail the specific expectations and obligations of the employee and explain consequences for not meeting those expectations and obligations. The notice must include, when appropriate:

- That the leave may be counted against the employee's 12-week entitlement
- The employee's right to substitute paid leave, whether the employer requires substitution of paid leave, and any conditions related to substitution
- Requirements for certification of need for leave and consequences for failure to obtain certification
- Whether the employer will require the employee to make premium payments for health benefit coverage, the arrangements for doing so, and the consequences for failing to do so
- Whether the employee will be required to provide certification for his or her ability to return to work at the end of the leave
- The employee's right to reinstatement at the end of leave
- Whether the employee is deemed a "key employee" who may be denied reinstatement, including an explanation of the conditions for such denial

The notice can also include additional information, such as whether the employer will require periodic reports of the employee's status and intent to return to work.

The *FMLA - Notice of Eligibility and Rights and Responsibilities* form is appropriate for use by California employers.

FMLA - Notice of Eligibility and Rights and Responsibilities

FMLA - Notice of Eligibility and Rights and Responsibilities - Spanish

Failure to provide an employee with notice of his/her rights to take family and medical leave can result in liability.

Designation of Leave

The employer must also designate leave as FMLA qualifying and provide notice of designation. See "Family and Medical Leave Designation" on page 490 for information regarding the designation notice and timelines for providing this separate notice to employees.

Employee Requirements

You can require that employees provide at least 30 days' advance notice before family and medical leave begins if the need for the leave is anticipated (the expected birth of a child or planned medical treatment). The employee must consult with you and make a reasonable effort to schedule any planned medical treatment or supervision to minimize disruption of company operations (subject to the health care provider's approval).

If it is unknown when leave is required to begin, a change in circumstances happens or a medical emergency exists and it is not possible for the employee to give 30 days' notice, the employee must give notice as soon as is feasible. You cannot deny leave for an emergency or unforeseeable personal or family circumstances because the employee did not provide advance notice of the need for the leave.

In the case of FMLA leave for a qualifying exigency, the employee must give notice of the need for such leave as soon as possible and practical, regardless of how far in advance the leave is needed.

California regulations require an employee to provide at least verbal notice requesting a CFRA-qualifying leave and the leave's anticipated timing and duration. An employee need not explicitly claim rights under, or even mention, CFRA or FMLA. However, the employee must communicate that the leave is needed for a protected reason to meet the notice requirement.

For instance, the mere mention of "vacation," other paid time off or resignation does not mean the employee's notice is insufficient so long as the underlying reason is CFRA-qualifying and the employee tells the employer that reason. The employer can inquire further to determine if the employee is seeking family and medical leave.

The employee is required to respond to the employer's questions to determine if the leave qualifies for protection. Failure to respond may result in denial if the employer can't determine if the leave qualifies.

However, if the employee doesn't reference a qualifying purpose, an employer can't ask if the time off is for a qualifying reason. For more information, see "Family and Medical Leave Designation" on page 490.

You must communicate what type of advance notice you require of your employees.

Include the notice requirements in your employee handbook's general family leave notice. If you fail to give or post this notice, you cannot take any adverse action against the employee, including denying family leave for failing to give advance notice of a family leave need.

An employee requested a one-week vacation to spend Christmas with his parents in Michigan, commenting on his parents' deteriorating health and his concern that their death might be near. The employer denied the request because no open vacation slots existed for that week. The employee sued, alleging that the employer violated the CFRA by denying his request for family leave.

The court said the request to spend the Christmas holiday with parents who might pass away in the near future is not to provide care for their serious health condition. The court stated that an employer is not required to be clairvoyant.[42]

An employee may by his own actions relieve you of the obligation to offer FMLA leave. If an employee specifically indicates that he/she does not wish to take a leave of absence but intends to resign, you are not responsible for offering family medical leave, reserving the employee's job or reinstating the employee when the need for the absence is over.

The *Request for Leave of Absence - FMLA/CFRA/PDL* form is optional and based on company policy.

Request for Leave of Absence - FMLA CFRA PDL

Request for Leave of Absence - FMLA CFRA PDL - Spanish

Family and Medical Leave Designation

Employers need to designate leave as family and medical leave, based on information provided by the employee or the employee's spokesperson, and to give the employee notice of the family and medical leave designation. If you do not believe you have sufficient information to evaluate the request, notify the employee and request additional information.[43]

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[42] *Stevens v. California Department of Corrections*, 107 Cal. App. 4th 285 (2

Responding to Requests for Family and Medical Leave

When you have enough information to determine if the leave is being taken for a FMLA/CFRA qualifying reason, you must notify the employee in writing whether the leave will be designated and counted as FMLA/CFRA.

FMLA and CFRA regulations require employers to notify an employee whether the leave will be designated and counted as FMLA/CFRA leave within **five business days** after you have enough information to determine whether the leave is for a qualifying reason (e.g., after receiving a medical certification). If you deny the request for leave, FMLA regulations require you to state at least one reason why.

This designation notice can be given at the same time as the *FMLA - Notice of Eligibility and Rights and Responsibilities* if the employer has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave.

Although the employer is required to respond within these set time frames, the response can include a request for additional information.[44]

You can use the following designation notices to notify employees whether the request has been approved, or denied, or to request more information and give conditional approval of the request:

FMLA/CFRA Designation Notice

FMLA/CFRA Designation Notice - Spanish

FMLA PDL - Designation Notice

FMLA PDL Designation Notice - Spanish

If an employee requests to use paid leave for a FMLA/CFRA qualifying purpose but does not explain the reason for the leave (consistent with your established policy or practice) and you deny the leave, the employee must provide sufficient information to establish a FMLA/CFRA qualifying reason that the employee or a family member has a serious health condition.

After the employee provides enough information to validate the need for leave under FMLA/CFRA, you can then count the leave, paid or unpaid, against the employee's 12-week entitlement.

An employee who uses paid leave and then seeks an unpaid extension for a FMLA/CFRA qualifying event must state the reason for the extension. If the extension is for an event that occurred during the period of paid leave, you can count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

> **Example:** An employee takes a two-week vacation with his family. At the beginning of the second week of vacation, the employee's daughter falls, breaking numerous bones. The employee seeks an additional two weeks of CFRA/FMLA leave to take his daughter to doctor's appointments and to provide for her physical care. The employer may count three weeks against the employee's CFRA/FMLA leave entitlement: the second week of the employee's vacation as well as the two weeks of unpaid leave.

If an employee requests additional leave for the same reason as the first leave, he/she need not meet the eligibility tests again to re-qualify for additional leave within the 12-month period. The employee is

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[43] 29 CFR sec. 825.300(d)

[44] *Olofsson v. Mission Linen Supply*, 211 Cal. App. 4th 1236 (2012)

entitled to take additional leave for the same reason as the first leave, even if there are fewer than 50 employees at his/her worksite or within a 75-mile radius.

If the additional leave is requested for a different reason than the original leave, the employee must re-qualify (for example, the first six weeks of leave was for care of a newborn and additional leave is requested for the employee's own illness).

If an employee requests vacation time or paid time off (PTO) without referring to a qualifying purpose, you cannot ask if the employee is taking the time off for a CFRA leave-qualifying purpose (although an employer may ask if the time off is potentially for a FMLA leave-qualifying event, since the employer cannot ask about the purpose under CFRA, the prudent course would be not to ask about the purpose for a FMLA leave either).

If you deny the employee's request, and the employee then provides information that the requested time off is (or may be) for a FMLA/CFRA leave-qualifying purpose, you may inquire further into the reasons for the absence.

An employee can waive his/her right to FMLA/CFRA by refusing to provide certification of the need for leave. If this happens, you are under no obligation to provide the leave. Or, if an employee resigns and refuses to give you enough information on the need for leave, he/she has waived his/her rights to FMLA or CFRA. Carefully document the employee's refusal and consult counsel about sending written notice to the employee that his/her failure to comply with the certification process resulted in a denial of FMLA/CFRA rights.

Declining Use of FMLA Leave

In a 2014 case, the Ninth Circuit held that an employee can decline to exercise his/her leave rights under the federal Family and Medical Leave Act (FMLA), even when the employee is taking time off for a reason that would qualify for FMLA purposes. The court held that an employee can decline to use FMLA leave to preserve the leave for future use. The court also held that this is not the same as a permanent waiver or relinquishment of the right.

The court noted that if the employee chooses not to exercise his/her FMLA rights for a particular leave of absence, it's logical that the employee also gives up any FMLA protections.[45]

The case is fact specific. The employee was terminated for violating a no-call, no-show policy. The employee argued that she shouldn't have been fired because the employer was required to designate her vacation to take care of her ill father as protected FMLA leave, regardless of whether she declined such leave.

The court disagreed, finding that the FMLA regulations "strongly suggest" that employees might choose not to exercise their FMLA rights.

Under the facts of this case:

- The employee specifically requested only vacation time
- The employer asked her twice if she needed more time off and she responded that she did not
- The employee also used FMLA 15 times in the past and knew how to ask for it

This Ninth Circuit decision seems to be in conflict with FMLA provisions relating to designation and with common employer practices.

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[45] *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236 (9th Cir. 2014)

Exercise caution. This is a complicated compliance area and could lead to FMLA interference claims. Consult with legal counsel if you have an employee who does not want to use FMLA leave for a qualifying event.

This case highlights some best practices, including:

- Make sure you understand what type of leave an employee is asking for when they request time off
- If leave appears to be for a FMLA/CFRA qualifying reason, discuss the employee's right to request FMLA/CFRA leave and that FMLA/CFRA provides protected leave
- Provide the *FMLA - Notice of Eligibility and Rights and Responsibilities* form if the employee requests FMLA/CFRA-related leave or when you acquire knowledge from the employee that the leave may be for a qualifying reason. Better to be safe and provide the notice because failing to provide it can result in liability
- Maintain appropriate documentation

Retroactive Leave Designation

Employees may need leave for a FMLA/CFRA qualifying reason and be unable to provide advance notice. For example, a pregnant employee may deliver early or an employee and/or family member may experience a medical emergency. In these cases, you may not learn of the need for leave for a day or more. You may be able to retroactively designate the time as FMLA and/or CFRA, depending on the type of leave and the circumstances.

FMLA regulations provide that if leave is not designated, employers can retroactively designate leave as FMLA provided the failure to timely designate the leave as FMLA does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, you and an employee can mutually agree that leave be retroactively designated as FMLA leave.[46]

CFRA regulations provide that employers may not retroactively designate leave as CFRA leave after the employee has returned to work, except with appropriate notice to the employee and where the employer's failure to designate the leave in a timely manner does not cause harm or injury to the employee.[47]

If an employee specifically indicates that he/she does not want to take a leave of absence but intends to resign, you are not responsible for:

- Offering family medical leave
- Reserving the employee's job
- Reinstating the employee when the need for the absence is over

Denying Family and Medical Leave

Some employees who request FMLA/CFRA will not be eligible for the leave. Document denial of family and medical leave for employees who:

- Fail to provide required medical certification of the need for leave
- Are not eligible for FMLA/CFRA because they do not work within 75 miles of 50 employees, have not worked for the employer for a year or have not worked 1,250 hours in the prior year

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[46] 29 CFR sec. 825.301(d)

[47] 2 CCR sec. 11091 (a)(1)(B)

- Exhausted their 12 weeks of FMLA/CFRA in the current 12-month period
- Exhausted their 26 weeks in the current 12-month period if the leave is to care for an ill or injured servicemember

FMLA regulations require employers to give at least one reason to an employee when leave is denied.[48]

Duration and Timing of Family and Medical Leave

An employee can take up to 12 workweeks of family and medical leave in a 12-month period. He/she can take all 12 weeks at once, or take leave in shorter increments of hours, days or weeks (see "Intermittent Leave" on page 494). An employee can also use leave to create a reduced work schedule, where he/she works fewer hours per day and counts those hours toward the 12-week entitlement. See "Calculating Weeks for Leave" on page 480 for more information.

For leave to care for an ill or injured servicemember, an employee can take up to 26 workweeks of family care leave in a single 12-month period. The 12-month period begins on the first day of the leave, regardless of how you designate the 12-month period for other FMLA/CFRA leaves. This leave can be intermittent if needed.

Baby bonding exception: When leave is used for baby bonding and both parents work for the same employer, the employer can limit the two employees to a combined total of 12 weeks of family and medical leave. For more, see "Leave When Parents Work for the Same Employer" on page 504.

The FMLA specifies that this limitation covers husband and wife, but the CFRA applies it to parents, regardless of whether they are married.

Notwithstanding this baby-bonding limitation on leave, a husband and wife can each take up to 12 weeks of leave to care for a child with a serious health condition, even if they both work for the same employer.[49]

Intermittent Leave

Employees can either take leave all at once or intermittently, with some restrictions.

Employee's Serious Health Condition, Care for a Family Member

For the minimum duration of intermittent leave for an employee's serious health condition or for care of family member, you can limit family and medical leave increments to the shortest period that your payroll system uses to account for absences or use of leave, provided that it is not greater than one hour. For example, if employees must use vacation or sick time in half hour increments or more, then you can require an employee leaving 20 minutes before the end of the workday for treatment for a serious health condition to use a half hour of his/her family and medical leave entitlement.

If employees need intermittent or reduced schedule leave for planned medical treatment, they must make a reasonable effort to schedule the treatment to not unduly disrupt their employer's operations.[50]

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[48] 29 CFR sec. 825.700(b); 2 CCR sec. 11088(c)
[49] 29 CFR sec. 825.120(a)(6)
[50] 29 CFR sec. 825.203; 2 CCR sec. 11090(c)(2)

Baby Bonding

The minimum duration of intermittent leave for baby bonding is two weeks for CFRA-only leave.

However, you must grant a request for leave under CFRA of less than two weeks' duration on any two occasions and may grant requests for additional occasions of leave lasting less than two weeks.[51]

All leave for baby bonding must conclude within one year of the birth of the child, or one year from the date the child was placed with the employee for adoption or foster care. Under FMLA regulations, eligible employees can work an intermittent or reduced schedule for baby bonding only if the employer agrees.[52]

Physically Impossible to Use Leave

Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to begin or end work mid-way through a shift, such as where a flight attendant is scheduled to work aboard an airplane or a laboratory employee is unable to enter or leave a sealed "clean room" during a certain time period, the entire period that the employee is forced to be absent is designated as CFRA leave and counts against the employee's CFRA entitlement.

However, an employee must be permitted to return to work if the employee is able to perform other aspects of the work that are not physically impossible, such as administrative duties, and thereby shorten the time designated as CFRA leave.[53]

Temporary Transfer During Intermittent Leave

If an employee anticipates the need for intermittent leave or leave on a reduced work schedule based on planned medical treatment for the employee or a family member, you can require the employee to transfer temporarily to an available alternative position. This alternative position must offer the equivalent rate of pay and benefits; the employee must be qualified for the position; and the position must better accommodate recurring periods of leave than the employee's regular job. The alternative position need not consist of equivalent duties.

Transfer to an alternative position includes altering an existing job to accommodate the employee's need for intermittent leave or reduced work schedule and must comply with any applicable collective bargaining agreement or employer leave policy, the Fair Employment and Housing Act, and any other applicable state or federal law. The employer must not transfer the employee to an alternative position to discourage the employee from taking leave or otherwise to work a hardship on the employee.

Pay and Benefits During Family and Medical Leave

Family and medical leave is generally unpaid, though employees have certain rights to substitute accrued paid leave for the otherwise unpaid time. You must continue providing any group health benefits at the same level and under the same conditions as if the employee were actively employed. This includes medical, dental, vision, mental health and other coverages, and coverage for dependents. If the employee does not return from the leave, you can recover benefit premiums paid during the leave under certain conditions. For more information, see "Other nondiscriminatory factors (such as documented performance issues)" on page 510.

Employers cannot require employees on FMLA/CFRA leave who receive pay under a disability benefit plan (such as SDI or PFL) to use accrued benefits such as sick, vacation or paid time off (PTO) during the leave. Similarly, the employee cannot require the employer to substitute paid leave if the employee is receiving pay under a disability benefit plan.[54] Because of the complexity of this issue, it is strongly suggested that you consult legal counsel.

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[51] 2 CCR sec. 11090(d)

[52] 29 CFR sec. 825.120(a)(6)

[53] 29 CFR sec. 825.205(a)(2); 2 CCR sec. 11090(e)(3)

Because FMLA/CFRA is unpaid leave, you are not obligated to compensate an employee taking FMLA/CFRA leave. However, employees can obtain compensation through state disability insurance (SDI) and paid family leave (PFL) benefits, sick pay (including compensation under the new mandatory paid sick leave law), vacation and PTO.

State Disability Insurance (SDI) and Family and Medical Leave

If an employee takes FMLA/CFRA leave for his/her own serious injury or illness, he/she can receive SDI payments. SDI is an employee-funded insurance program administered by the California Employment Development Department (EDD). Most employees are eligible for payments if absent for a qualifying reason. There is a seven-day waiting period before benefit payments begin. For more information, see Chapter 15, "State Disability Insurance (SDI) and Paid Family Leave (PFL)" and "Coordinating SDI With Other Benefits" in Chapter 15, page 385.

Paid Family Leave (PFL) and Family and Medical Leave

Employees absent to care for a family member or to bond with a child during the first year after the birth, adoption, or placement for foster care may be eligible for PFL benefits. Like SDI, PFL is also an employee-funded insurance program administered by the EDD. There is a seven-day waiting period before benefits begin. A woman who begins CFRA leave for baby bonding need not wait seven days for PFL benefits to begin if she had been receiving SDI while on PDL or FMLA. For more information, see Chapter 15, "State Disability Insurance (SDI) and Paid Family Leave (PFL)."

Although PFL benefits are available to employees on CFRA leave to care for a domestic partner or a domestic partner's child, the FMLA does not cover those reasons.

Vacation, Paid Time Off (PTO) and Family and Medical Leave

If the FMLA/CFRA leave is unpaid, you can maintain a policy requiring the use of vacation or other accrued PTO during the family leave. One exception to this is when the leave is also pregnancy disability leave (PDL). The PDL regulations prohibit requiring the use of vacation or PTO while the employee is on PDL. This is true whether the leave is PDL only or PDL/FMLA.

Be sure that there is no conflict with their use under your policy.

> **Example:** The employer's policy states that vacation can only be used during slow months of the year — November and December. The employee who takes FMLA/CFRA to care for a spouse during January and February could not be required to use vacation for the FMLA/CFRA leave.

If you do not have a policy requiring the use of accrued vacation or PTO during family and medical leave, the employee can choose to use vacation or PTO at his/her option.

If an employee receives paid disability payments (such as state disability insurance, workers' compensation or other disability payments) or paid family leave benefits while on FMLA or CFRA leave, you cannot require the employee to use accrued benefits such as vacation or PTO during the

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leave. The employee can use accrued benefits to supplement disability benefits or paid family leave payments if you both agree to do so.

Sick Pay and Family and Medical Leave

If the FMLA/CFRA leave for the employee's own serious health condition is unpaid, you can maintain a policy requiring the use of paid sick leave during the leave, if there is no conflict with the use under your policy.

If the FMLA/CFRA leave is unpaid and you have no policy about the use of sick leave, the employee can use sick leave at his/her option.

If an employee receives paid disability payments (such as state disability insurance, workers' compensation or other disability payments) or paid family leave benefits while on FMLA or CFRA leave, you cannot require the employee to use accrued sick leave benefits during the leave. The reasoning is that because the employee is receiving a disability payment while on FMLA or CFRA, it is not really an unpaid leave. However, the employee can use accrued benefits to supplement disability benefits or paid family leave payments if you both agree to do so.

Since July 1, 2015, California employers are required to provide mandatory paid sick leave benefits (AB 1522/the Healthy Workplaces, Healthy Families Act).[55] This leave can be used for the employee's own illness or to care for other family members, which include an employee's spouse, child, parent, registered domestic partner, grandparent, grandchild or sibling. Logically, this mandatory paid leave may be treated the same as employer provided sick days were treated in the past. In other words, you could have a policy requiring an employee to use his/her accrued paid sick leave during unpaid FMLA/CFRA leave (under the same conditions as described herein). For more information, see Chapter 20, "Paid Sick Leave."

However, this answer is not entirely clear as the Healthy Workplaces/Healthy Families Act is silent on the point.

The interaction of the new paid sick leave mandate with other leave laws is uncharted territory.

Health Insurance and Family and Medical Leave

If you provide health benefits under any group health plan, you must continue providing those benefits during an employee's family and medical leave. The following rules apply:

- You must maintain and pay for the employee's health coverage at the same level and under the same conditions as coverage would have been provided if the employee was continuously employed during the entire leave period (up to 12 weeks or up to 26 weeks during a leave to care for an ill or injured servicemember).
  - **Example:** You pay 80 percent of an employee's health insurance premium and the employee pays 20 percent. When an employee takes family and medical leave, you must continue to pay 80 percent. The employee must pay you the remaining 20 percent each month to remain covered. Because you cannot make normal payroll deductions during any unpaid portion of the leave, you must make payment arrangements with the employee.

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[55] Lab. Code secs. 245 - 249

- If your group health plan includes dental care, vision care, mental health counseling, etc., or if it includes coverage for the employee's dependents and for the employee, you also must continue this coverage to the same extent.
- Your obligation to continue benefits may extend longer than 12 weeks if you provide more than 12 weeks of benefits to employees on other types of leave.
- If the leave is also for pregnancy disability, you must continue health benefits for a maximum of four months in a 12-month period.

Pregnancy disability law requires that employers continue group health coverage for a maximum of four months, at the same level and under the same conditions as if the employee were still employed.

California's amended pregnancy disability regulations (effective December 30, 2012), as well as its amended CFRA regulations (effective July 1, 2015), clarify that the time the employer maintains and pays for group health coverage during PDL cannot be used to meet the employer's obligation to pay for 12 weeks of group health coverage under the California Family Rights Act (CFRA). Rather, the entitlements to employer-paid group health coverage during PDL and CFRA are two separate and distinct entitlements.[56]

Dropping group health coverage for an employee still considered a full-time employee (because, for example, an employee is taking further leave as a reasonable accommodation for a disability) may violate the Affordable Care Act's requirements to provide a full-time employee with minimum essential coverage. For more information, see "Employer Shared Responsibility Mandate" in Chapter 17, page 425.

Consult with legal counsel before dropping health insurance coverage.

Other Insurance Benefits and Family and Medical Leave

You must be aware of other benefit requirements while an employee takes family and medical leave. Employees on FMLA/CFRA leave (paid or unpaid) are entitled to retain employee status during the leave period. The leave does not constitute a break in service for purposes of longevity or seniority under any collective bargaining agreement or under any employee benefit plan.

Pension and Retirement or Supplemental Unemployment Insurance

The employee is entitled to participate in the plans to the same extent as employees on unpaid personal or disability leaves can participate. You are not required to make plan payments to any pension and/or retirement plan or to count the leave for purposes of time accrued under the plan during any unpaid portion of family and medical leave. However, you must allow the employee to continue to make contributions in accordance with the terms of the plan.

For further information on the DOL regulation, contact:

Office of Workforce Security
Employment and Training Administration (ETA)
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-4231
Washington, D.C. 20210
Telephone: (202) 693-3046

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Life Insurance, Short- or Long-Term Disability Plans or Insurance, Accident Insurance or Other Similar Benefit Plans

As a condition of continued coverage, you can require the employee to pay premiums at the group rate. If the employee chooses not to pay premiums to continue these benefits, the employer cannot consider the nonpayment of premiums as a break in service for purposes of longevity, seniority under any collective bargaining agreement or any employee benefit plan requiring the payment of premiums.

Salary Deductions, Exempt Status

Family and medical leave taken by an exempt employee will not affect his/her status. You can make deductions from the exempt employee's employer provided leave banks for hours taken as intermittent or reduced schedule family and medical leave without affecting his/her exempt status. For more information on exempt status, see Chapter 4, "Exempt and Nonexempt."

Both federal and California law permit deductions from the exempt employee's salary for partial days of absence for FMLA or CFRA so long as the reduction is not inconsistent with any applicable collective bargaining agreement or employer leave policy or any other applicable state or federal law.

If the exempt employee no longer performs exempt duties, you can temporarily change the employee's classification to nonexempt. This will require that you pay him/her on an hourly basis. You must ensure that the employee takes all required rest and meal breaks and is paid any applicable overtime.

Don't forget that beginning July 1, 2015, employees, including exempt employees, are entitled to accrue mandatory paid sick days under the Healthy Workplaces, Healthy Families Act.

Leave Interactions

Controlling family and medical leave begins with recognizing a qualifying event, either because the employee tells you about the event or you learn about it some other way, and then notifying the employee that he/she is placed on FMLA-only, FMLA/CFRA or CFRA-only leave. By providing notice that the leave is designated as such, you start counting the absences against the legally mandated 12-week or 26-week entitlement and any additional leave you choose to provide by policy.

This process also involves coordinating leave entitlements with your voluntary policies of allowing or requiring other forms of leave. Leaves of absence can occur either one after the other (as with CFRA-only leave for baby bonding, which can begin only after pregnancy disability ends or after the child is born), or overlapping (as with pregnancy disability leave and FMLA leave, which run concurrently). Running leaves of absence concurrently with one another where allowed by law is a key tool in managing the overall amount of time an employee is away from work.

FMLA and CFRA contain similar provisions. They run concurrently for all purposes other than:

- Leave to care for a registered domestic partner (CFRA only)
- Disabilities due to pregnancy or pregnancy-related condition (FMLA only)
- Leave for a qualifying exigency related to a family member's military service (FMLA only)
- Leave to care for an ill or injured servicemember (FMLA only). Note that if the servicemember is a CFRA-covered family member (parent, child or spouse) and if the servicemember has a qualifying serious health condition which warrants the participation of the employee, the first 12 weeks of care would qualify as a CFRA leave and run concurrently with FMLA. The last 14 weeks would be FMLA only.

CFRA and Registered Domestic Partners

The FMLA does not provide registered domestic partners with FMLA leave. But, CFRA provides employees with leave for this reason. Because registered domestic partners, as defined in the California Family Code, possess the same legal rights as a spouse,[57] an eligible employee would be entitled to up to 12 weeks of leave that is CFRA-only to care for his/her registered domestic partner. This does not affect the employee's FMLA entitlement.

Registered domestic partners can be granted or entitled to more leave than single or married employees under one circumstance: If a registered domestic partner takes CFRA leave first to care for his/her domestic partner, he/she would still have 12 weeks of leave available under FMLA during that 12-month period. The FMLA time could then be used by the employee for another reason, such as for his/her own serious illness or injury or to care for a parent or child.

In contrast, the married employee who first takes leave to care for a spouse is entitled to 12 weeks of CFRA leave, but the CFRA leave runs concurrently with FMLA because a spouse is included under the federal law. If that married employee later needs time off for another reason during the same 12-month period, perhaps to care for a parent or child or for their own serious illness or injury, the employee is not entitled to more leave.

This creates the potential for a claim of discrimination on the basis of marital status: Because the individual is married, he/she is denied a benefit that is available to a registered domestic partner.

The issue of marital status discrimination is complex and unsettled — consult legal counsel before granting or denying an additional leave of absence to married employees or employees in a registered domestic partnership. You could voluntarily remedy this by providing additional leave to the married employee whose first absence is to care for a spouse but who then needs additional time off because of the employee's own serious condition or to care for a child or parent with a serious condition.

Employers contracting with San Francisco local government should consult legal counsel about providing leave to registered domestic partners under the city's domestic partner ordinance.

See the Leave Interaction form for an illustration of how different types of leave interact.

Registered Domestic Partners Versus Same-Sex Spouses

Registered domestic partners are opposite-sex couples with one partner over the age of 62 or same-sex couples who have registered their relationship with the California Secretary of State.[58] You cannot ask for proof of registered domestic partnership unless you also require proof of marriage.

A registered domestic partner is not the same as a legally married same-sex spouse. There is a legal distinction between the two. Although California generally provides registered domestic partners with the same rights and responsibilities as spouses, they are not spouses for federal purposes.

Same-sex marriage is legal in California after the U.S. Supreme Court's ruling in *Hollingsworth v. Perry* and is legal in all 50 states after the U.S. Supreme Court's decision in *Obergefell v. Hodges*.[59]

New 2016

Under the FMLA and CFRA, an employee who resides in California can take time off to care for a same-sex spouse with a serious health condition. The CFRA specifically includes same-sex spouses.

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[57] Family Code [illegible]

[58] F[illegible]

[59] *Hollingsworth v. Perry*, 130 S.Ct. 705 (2013); and *Obergefell v. Hodges*, 2015 133 S.Ct. 2584 (2015)

Moreover, same-sex spouses are now covered under the FMLA as a result of recent rules from the Department of Labor and the U.S. Supreme Court's decision that same-sex couples have a constitutional right to marry in all 50 states and every state must recognize same-sex marriages lawfully licensed and performed out-of-state.[60] For more information, see "FMLA and CFRA Qualifying Reasons" on page 472.

CFRA and FMLA leave used to care for a same-sex spouse can run concurrently. But this is not the case for registered domestic partners who are covered by CFRA but not by FMLA. As the law stands, these leaves will not run concurrently. More guidance from federal and/or state agencies is needed.

Pregnancy and Family and Medical Leave

Leave for pregnancy, childbirth or a related medical condition is covered by California's Pregnancy Disability Leave Act (PDL). If the employee is eligible for FMLA/CFRA, leave under the PDL will run concurrently with FMLA for a maximum of 12 weeks. CFRA specifically excludes pregnancy and other related disabilities from coverage.

After the baby is born, the employee is entitled to additional leave under CFRA for baby bonding. Rights of employees disabled by pregnancy or pregnancy-related conditions are discussed in more detail in Chapter 19, "Pregnancy Disability Leave (PDL)."

- PDL time available is four months, which is defined as the number of days the employee would normally work within four calendar months, or one third of a year, or 17 1/3 weeks. Of this, 12 weeks, 60 days, or 480 hours can run concurrently with FMLA. Keep in mind that four months of leave is allowed for each pregnancy. This is not an annual limit. An employee who took time off early in the year in a high-risk pregnancy and then miscarried would be entitled to a new leave of up to four months if she became pregnant again later that same calendar year. If she has exhausted all her FMLA leave for the 12-month period your company uses, she may only be eligible for PDL.
  - Actual PDL time is based on actual periods of disability. The employee must be designated as disabled because of pregnancy, childbirth or related medical condition by her treating physician, if you require medical certification.
  - PDL requires up to four months of continued health benefits during a twelve-month period.
- CFRA leave taken after a PDL/FMLA leave is 12 weeks, 60 days, or 480 hours. CFRA can be taken for purposes of bonding with the baby. No medical certification is required if CFRA is taken for baby bonding.
- The eligibility requirement for an employee who takes CFRA leave for baby bonding after exhausting PDL or FMLA is different than for an employee who takes FMLA or CFRA. If taking CFRA leave only, the 12-month period during which the employee must have worked 1,250 hours is the period immediately preceding her first day of PDL or FMLA leave, based on her pregnancy disability. She need not meet the 1,250 hour eligibility requirement a second time before taking CFRA for baby bonding.
- FMLA/CFRA requires that eligible employees be provided with continuation of health benefits as if the employee still were at work and on the payroll. Employees get up to 12 weeks of continued health benefits in each 12-month period.

CFRA covers employers with 50 or more employees and an eligible employee who, after taking a FMLA/PDL leave, takes up to 12 weeks of CFRA for purposes of baby-bonding leave. CFRA does not run concurrently with FMLA/PDL. You can require use of accrued vacation during CFRA leave. See "PFL Benefit Payments" in Chapter 15, page 399.

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[60] *Obergefell v. Hodges*, 135 [illegible]

The designation of PDL, and thus FMLA, is determined by the employee's health care provider. The employee is not automatically entitled to the full four months of PDL or 60 days of FMLA.

See the Leave Interaction form for an illustration of how different types of leave interact.

Qualifying Exigency for FMLA Leave

Eligible employees under FMLA are entitled to up to 12 weeks of leave because of any qualifying exigency arising because the spouse, son, daughter or parent of the employee is on active duty, or has been notified of an impending call to active duty status. Leave for a qualifying exigency does not affect the employee's CFRA entitlement.

See the *FMLA - Family Member Leave for a Qualifying Exigency* form for the complete definition of "qualifying exigency."[61]

FMLA - Family Member Leave for a Qualifying Exigency

FMLA provides up to 12 weeks, 60 days, or 480 hours of time off because of a qualifying exigency. This time does not run concurrently with CFRA. You can require documentation to support the need for leave.

FMLA also requires that employers provide eligible employees with continuation of health benefits as if the employee still were at work and on the payroll. Employees get 12 weeks of continued health benefits in each 12-month period. If an employee takes the full 12 weeks of FMLA because of a qualifying exigency, he/she will have exhausted the available health benefits under FMLA within a 12-month period.

For example, an eligible employee takes eight weeks of FMLA leave for a qualifying exigency. Two weeks after she returns to work, her registered domestic partner is hospitalized for one week in need of care and is subsequently at home in need of care for three weeks, according to the medical certification:

- The employee is eligible for up to 12 weeks of FMLA-only leave for a qualifying exigency and took eight weeks, so she has four weeks of FMLA-only or FMLA/CFRA leave remaining.
- She is eligible for up to 12 weeks of CFRA-only leave to care for a registered domestic partner, in addition to her 12 weeks for a qualifying exigency under FMLA. She took eight weeks for FMLA-only qualifying exigency leave and four weeks of CFRA-only leave to care for her registered domestic partner. In all, she took a total of 12 weeks of leave.
- The organization must continue her health benefits for a total of 12 weeks in a 12-month period. Because she took a total leave of 12 weeks, the organization was required to continue her health benefits for the duration of both her FMLA-only and CFRA-only leaves.

Leave to Care for an Ill or Injured Servicemember

An employee who is the spouse, son, daughter, parent or next of kin of a covered servicemember (including certain veterans) is entitled, under the FMLA, to a total of 26 workweeks of leave during a 12-month period to care for the servicemember. If the employee does not take the entire 26 weeks of leave entitlement within the 12-month period, the employee forfeits the remaining amount of leave available.[62] The 12-month period begins on the first day of leave, regardless of how you calculate the 12-month period for other FMLA/CFRA leaves.

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[61] 29 CFR sec. 825.126

FMLA provides 26 weeks, 130 days, or 1040 hours of time off to care for an ill or injured servicemember. The first 12 weeks of time runs concurrently with CFRA if the injured servicemember is a spouse, parent or child of the employee and the injury also is a qualifying serious health condition. It does not run concurrently with CFRA if the servicemember is next of kin. You can require documentation to support the need for leave. FMLA requires that employers provide eligible employees with continuation of health benefits as if the employee still were at work and on the payroll. Employees on leave to care for an ill or injured servicemember get up to 26 weeks of continued health benefits in the 12-month period

This is in contrast to other FMLA/CFRA leaves, which limit the health benefits entitlement to 12 weeks within a 12-month period.[63]

If an employee takes less than 26 weeks of FMLA to care for an ill or injured servicemember, he/she is still only entitled to a total of 12 weeks of health benefits within a 12-month period for any other type of FMLA/CFRA leave.

For example, an eligible employee takes 20 weeks of leave to care for his son, who returned from military service with a serious injury and needs care. Two months later, the employee needs 10 weeks of leave due to a qualifying exigency relating to his daughter's military service.

- He is eligible for up to 26 workweeks of FMLA only leave to care for his son and used 20 weeks of his available leave.
- During any single 12-month period an eligible employee's FMLA leave entitlement is limited to a combined total of 26 workweeks of FMLA leave for any qualifying reason.[64] In this example, the employee used 20 workweeks for servicemember leave so he has six weeks left for FMLA-only qualifying exigency leave.
- The organization must continue his health benefits for a total of 26 weeks in a 12-month period when the leave is to care for an ill or injured servicemember. For FMLA-only leaves, benefits must continue during the period of the leave. You must continue health benefits for a total of 26 workweeks for FMLA-only leaves.[65]

FMLA and CFRA Concurrent Leave

FMLA and CFRA run concurrently if the leave of absence is needed:

- To care for the employee's spouse, parent or child
- As time off because of the employee's own serious illness or injury
- To bond with a newborn child (For the mother, any FMLA remaining after PDL will run concurrently with any CFRA taken for this purpose. For the father, FMLA/CFRA will run concurrently for a maximum of 12 weeks.)
- To bond with a child placed with the employee for adoption or foster care

The employee who needs leave for one of these qualifying reasons will have up to 12 weeks of leave, if the employee has not used any other FMLA/CFRA leave during the 12-month period the organization uses for these leaves.

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[62] 29 CFR sec. 825.127(c)

[63] 29 CFR sec. 825.209(a)

[64] 29 CFR sec. 825.200(g)

[65] 29 CFR sec. 825.209(a)

Example: An employee is injured while jet skiing and is unable to work for nine weeks. The employee is eligible for and will use nine weeks of FMLA/CFRA. The employee has three weeks of FMLA/CFRA available for the remainder of the 12-month period used by the employer.

Leave When Parents Work for the Same Employer

If two new parents both work for the same employer and both are eligible for FMLA/CFRA, the employer can limit the total amount of time for baby bonding to 12 weeks of leave. The employees determine how the time will be split.

Example: Both parents decide that the mother will take eight weeks of baby-bonding leave. She used all her FMLA leave prior to the birth of the child so she will be entitled to eight weeks of leave that is CFRA only. She will have four weeks of CFRA leave remaining that can be used for any purpose other than baby bonding. The father will use four weeks of FMLA/CFRA leave, and he has eight weeks of FMLA/CFRA remaining that can be used for any purpose other than baby bonding.

The FMLA regulations refer to a husband and wife who are employed by the same covered employer and who take leave for baby bonding. In that case, the husband and wife are limited to a combined total of 12 weeks for the baby bonding. Unmarried parents do not have to share the twelve weeks under FMLA.

The CFRA regulations permit the limitation on baby bonding leave if both *parents* are CFRA eligible and work for the same employer. The CFRA regulations also state that if the parents are not married, they may have different family care rights under the FMLA.

If you employ both parents and they request baby bonding leave under state and federal laws, consult with counsel to determine how much leave each may take for this reason.

Return to Work After Family and Medical Leave

You have certain obligations when an employee returns to work after taking family and medical leave. When you grant an employee's leave request, you must inform the employee that you guarantee to reinstate the employee to the same or comparable position. You are required to put the guarantee in writing if the employee requests. Only under very limited circumstances can you refuse to honor the guarantee of reinstatement. Specific requirements apply to employees returning to work from PDL leave.

If you and the employee agree on a definite date of reinstatement at the beginning of the leave, you must reinstate the employee by or on that date. If the reinstatement date differs from your original agreement with the employee, you must reinstate the employee within two business days after the employee notifies you of his/her readiness to return.

Requiring a Medical Release to Return from Leave

You can require that an employee who has been on leave for his/her own serious health condition obtain a release to return to work, but only if you have a uniformly applied practice of requiring such releases from other employees returning to work after illness, injury or disability. The release should be completed by the employee's health care provider before the employee is back at work.

The *FMLA CFRA Designation Notice* form can be used to advise the employee that such a release will be required. You should include a list of the essential functions of the employee's job with the designation notice, at the time the notice is given to the employee. Be sure to include any consequences to the employee if he/she does not obtain a release to return to work.

The *Certification of Health Care Provider for Employee Return to Work* form also can be used by the employee's health care provider to release the employee to return to work. Be sure to include a list of the essential functions of the employee's job if you have not previously provided it to the employee.

FMLA/CFRA Designation Notice

FMLA/CFRA Designation Notice - Spanish

Certification of Health Care Provider for Employee Return to Work

The employee is entitled to reinstatement upon certification from his/her health care provider that the employee is able to return to work. The employer is not entitled to seek a second opinion regarding the certification prior to reinstating the employee.[66]

However, once the employee is reinstated, the employer may require a fitness for duty exam consistent with the Americans with Disabilities Act, as long as the exam is job related and consistent with business necessity.[67] See "Medical Examinations and Inquiries During Employment" in Chapter 28, page 867 for more information.

In *White v. County of Los Angeles*, a California Court of Appeal allowed an employer to conduct a post-reinstatement fitness-for-duty exam of a peace officer who exhibited erratic behavior at work prior to taking FMLA leave for mental health issues.[68]

The case involved a senior investigator with the Los Angeles County District Attorney's Office, Susan White; a peace officer with authorization to carry a weapon. She began behaving erratically at work and showed signs of instability and poor judgment. She took 12 weeks of FMLA and additional approved unpaid leave.

White's doctor wrote a letter clearing her to return to work. The county reinstated her but then requested that she undergo a fitness-for-duty exam.

The court ruled that an employer may restore an employee to work and then seek its own evaluation of the employee's fitness for duty if that exam is:

- At the employer's own expense; and
- Job related and consistent with business necessity in compliance with the Americans with Disabilities Act (ADA).[69]

California's disability regulations also allow an employer to conduct fitness-for-duty exams of current employees that are both job related and consistent with business necessity.[70]

Right to Return and Intermittent Leave

An employer is not entitled to obtain a release to return to work for each absence taken on an intermittent or reduced leave schedule. However, an employer is entitled to a release to return to work for such absences up to once every 30 days if reasonable safety concerns exist about whether the employee can perform his/her duties.

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[66] 29 C.F.R. sec. 825.312(b); 2 CCR sec. 11091(b)(E)

[67] 2 CCR sec. 11091(b)(2)(F)

[68] *White v. County of Los Angeles*, 225 Cal.App.4th 690 (2014)

[69] 29 CFR sec. 825.313(h)

[70] 2 CCR sec. 11091(b)(2)(F)

Returning From Medical Leave to a Comparable Position

Employment in a "comparable position" means employment in a position virtually identical to the employee's original position in terms of pay, benefits, shift, schedule and working conditions, including privileges, fringe benefits and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility and authority. It must be performed at the same or a geographically close worksite from where the employee previously was employed. It ordinarily means the same shift or the same or an equivalent work schedule.

Benefits must be resumed in the same manner and at the same levels as provided when the leave began, subject to any changes in benefit levels that may have taken place during the period of CFRA/FMLA leave affecting the entire workforce, unless otherwise elected by the employee.

An employer may accommodate an employee's request to be restored to a different shift, schedule, position or geographic location that better suits the employee's personal needs on return from leave, from offering a promotion to a better position or from complying with an employer's obligation to provide reasonable accommodation under the Fair Employment and Housing Act's disability provisions.

Right to Re-employment After Family and Medical Leave

As with other types of legally-mandated leaves of absence, the employee on FMLA/CFRA leave has no greater right to re-employment than he/she would have if not taking the FMLA/CFRA leave.

When an employee is released to return to work, he/she returns to the job held before his/her leave unless he/she is no longer able to perform that job. If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, or other non-qualifying reason as a result of the leave, the employee must be given a reasonable opportunity to fulfill those conditions upon returning to work.

If an employee is unable to return to work after FMLA/CFRA because of his/her own disability, you may have to consider an extension of leave as a form of reasonable accommodation for the disability. For more information, see "Extension of FMLA/CFRA as a Reasonable Accommodation of a Disability" on page 510.

If the employee's inability to return is for a reason other than his/her own disability, you are obligated to provide additional leave only if your policy permits leave.

Requesting a Different Job or a Different Schedule

You are required only to return an employee to the same or a comparable position. Treat an employee's request to return to work on a part-time schedule or to take a different, available position the same as any other employee's request for a change in hours or positions. No special consideration for the request is necessary because of the employee's return from FMLA/CFRA leave.

Different rules may apply, however, if the employee's own serious health condition is also a disability and the request to return to work to an alternate position (part time or a different position) is a request for reasonable accommodation for that disability. In that instance, the employer would need to engage in a timely, good faith interactive process to see if the request would be effective in accommodating the employee's disability and would be reasonable for the employer.

Example: An employee returning from leave to care for an ill or injured servicemember requests a reduction in hours to spend more time with his family for a reason unrelated to the original leave.

> The employer should review this request in the same manner as a request from any other employee — determine the feasibility of complying with the request in relation to business needs and policies and practices. In addition, the decision should be made in the context of how future requests will be reviewed because complying with one employee's request sets a precedent for future decisions.

Both the FMLA and the CFRA prohibit discrimination or retaliation against an employee for exercising his/her rights created by the laws. You cannot retaliate against an employee for taking family and medical leave or for giving information or testimony about leave.[71] A supervisor may be held liable for retaliating against an employee where denial of a promotion or a recommendation for termination is attributable to the employee's exercise of FMLA-protected rights.[72]

Several courts ruled that these protections extend to past and prospective employees as well. Refusal to rehire a former employee because he/she previously took leave under the FMLA may violate the law.[73]

Seniority and Family and Medical Leave

An employee returning from leave must have at least as much seniority as he/she had at the time of starting the leave, for purposes of layoff, recall, promotion, job assignment and seniority-related benefits such as vacation. The employee retains his/her status and you must reinstate him/her to any benefits previously provided without any new qualification period, physical exams, etc.

During family and medical leave, the employee is entitled to accrual of seniority to the same extent and under the same conditions as would apply to any other non-family leave you grant:

- **For unpaid leaves:** Treat an unpaid leave for an employee's serious health condition, the care of a family member or for baby bonding like other unpaid disability leaves.
- **For paid leaves:** If company policy or state or federal law allow seniority to accrue when employees are out on paid leave, such as paid sick or vacation leave, then seniority accrues during any part of a paid family and medical leave.

Refusing Reinstatement After Family and Medical Leave

Though an employee has the right to return to the position held before taking a family and medical leave, this right is not absolute. If you can show a lawful reason for not restoring an employee to his/her position, such as the employee violating company policy, you can legally terminate the employee. The reason must be unrelated to the employee's exercise of family and medical leave rights.

Under FMLA and CFRA regulations, an employee who fraudulently obtains FMLA/CFRA leave from an employer is not protected by FMLA's or CFRA's job restoration or maintenance of health benefit provisions. In addition, if the employer maintains a uniformly applied policy governing outside or supplemental employment, this policy can continue to apply to an employee while on FMLA leave.[74]

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The CFRA regulations specify that the employer has the burden of proving that the employee fraudulently obtained or used CFRA leave.

In *Sista v. CDC Ixis North America, Inc.*, the Second Circuit Court of Appeals found a termination lawful because it was the result of the terminated employee's threats to other employees and not because of the employee's exercise of rights under the FMLA. If an employer terminates an employee for a legitimate, nondiscriminatory reason, the employer does not violate the FMLA.[75]

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[71] *Dudley v. Department of Transportation* [illegible]

[72] *Darby v. Bratch*, 287 F.3d 673 (2002).

[73] *Thomas v. Pearle Vision* [illegible]

[74] 29 CFR sec. 825.216(d)-(e)

You can refuse to reinstate an employee under circumstances involving key employees and layoffs/reductions in hours.

Key Employees

A key employee is defined as:

- A salaried employee.
- An employee among the highest paid 10 percent of your workforce within 75 miles of the employee's worksite at the time of the leave request.

To deny reinstatement, you must show that:

- The refusal is necessary because the employee's reinstatement causes substantial and grievous economic injury to your operations, such as threatening the economic viability of the business or causing substantial, long-term economic injury. Minor inconveniences and costs that the employer would experience in the normal course of doing business do not constitute "substantial and grievous economic injury."
- You notify the employee of your intent to refuse reinstatement when you determine the refusal is necessary due to economic injury to the business.

There are several specific requirements that must be followed before you can deny reinstatement based on key employee status.

Consult legal counsel with any questions regarding denial of reinstatement.

1. **Notice of "Key Employee" Status.** An employer who believes it may deny reinstatement to a key employee must inform the employee in writing at the time the employee gives notice of the need for CFRA/FMLA leave (or when CFRA/FMLA leave begins, if earlier) that the employee is a "key employee," informing the employee of the potential consequences for reinstatement and continuation of health benefits if the employer determines that reinstatement will result in "substantial and grievous economic injury" to its operations. If the employer cannot give such notice immediately because it needs to determine whether the employee is a key employee, it must give the notice as soon as practicable after the employee notifies the employer of a need for leave (or the beginning of leave, if earlier). An employer who fails to provide this notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

2. **Notice to Key Employee that Employer Will Deny Reinstatement.** As soon as an employer makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if it reinstates a key employee who has given notice of the need for CFRA/FMLA leave (or who is on CFRA/FMLA leave), the employer must notify the employee in writing that it cannot deny CFRA/FMLA leave, but that it intends to deny reinstatement on completion of the leave. An employer should ordinarily be able to give such notice prior to the employee starting leave. The employer must serve the notice either in person or by certified mail. The notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has begun, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the leave's duration and the urgency of the need for the employee to return.

75 [illegible]

3. **CFRA/FMLA Rights After Employer Notice.** If an employee on leave does not return to work in response to the employer's notification of intent to deny reinstatement, the employee continues to be entitled to maintenance of health benefits coverage and the employer may not recover its cost of health benefit premiums. A key employee's CFRA/FMLA rights continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement at the leave's end.

4. **Employee Request for Reinstatement at End of Leave Period Despite Employer Notice.** After an employer notifies an employee that substantial and grievous economic injury will result if the employer reinstates the employee, the employee still is entitled to request reinstatement at the end of the leave period even if he or she did not return to work in response to the employer's notice. The employer must then again determine whether reinstatement will result in substantial and grievous economic injury, based on the facts at that time. If the employer determines that substantial and grievous economic injury will result, the employer must notify the employee in writing (in person or by certified mail) of the reinstatement denial.

Employee Layoffs During Family and Medical Leave

An employee who takes family and medical leave can be refused reinstatement for reasons unrelated to the leave, such as misconduct or an organization layoff due to lack of work. Consider consulting legal counsel before taking action.

- **All employees:** Your responsibility to continue family leave ceases only if you can prove that an employee would have been laid off or terminated regardless of being on family and medical leave and would not otherwise be employed on the requested reinstatement date.
- If an employee is laid off during family and medical leave and employment is discontinued, your responsibility to continue the leave, maintain group health plan benefits and reinstate the employee ceases, if you do not bear any continuing obligations under a collective bargaining agreement or otherwise.
- If a shift has been eliminated or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon reinstatement.

Proving that an employee would have been laid off regardless of whether he/she was on family and medical leave is difficult. The following scenarios would **not** constitute a sufficient defense to an employer's refusal to reinstate an employee after family and medical leave:

- You redistribute the duties of an employee on family and medical leave to several other employees and find that they can handle the additional work.
- You hire a temporary employee to do the duties of the employee on family and medical leave and find that the temporary employee does a better job.
- You find it necessary to lay off one person from the department and because the employee on family and medical leave was already out of the workplace, you select him/her for the layoff.
- You hear through others (or even the employee on leave) that the employee is considering not returning to work at the end of the leave.

You can justify refusing to reinstate an employee if you can prove that you would have laid off the employee regardless of whether he/she was on FMLA/CFRA. This can be difficult to prove unless you have documented proof that you would have laid off the employee based on:

- Seniority (for example, everyone with less than four years' seniority was laid off)
- Position (for example, everyone in this same job was laid off)
- Department (for example, everyone in this department was laid off)

- Other nondiscriminatory factors (such as documented performance issues)

No Right to Reinstatement Under CFRA for Leave Exceeding 12 Weeks

A California court has ruled that an employer did not violate an employee's rights under the California Family Rights Act (CFRA) when it refused to reinstate an employee who tried to return to work after 12 weeks of medical leave had expired. The decision aligns California law under CFRA with decisions by federal courts under the Family and Medical Leave Act (FMLA).[76]

New 2016

However, recent amendments to California regulations may require employers to extend FMLA or CFRA leave for an employee with a disability. For more information, see "Extension of FMLA/CFRA as a Reasonable Accommodation of a Disability" on page 510.

Health Insurance Cost Recovery

You can recover the cost of group health insurance premium payments made during any unpaid part of a family and medical leave if the employee:

- Fails to return from leave when his/her leave entitlement has expired
- Or returns from leave but fails to work 30 calendar days after returning

However, if the reason for the failure to return is either beyond the control of the employee or because of a serious health condition starting, continuing or recurring, you cannot recover your costs.

An employer can recover the premium that it paid for maintaining group health care coverage during any unpaid part of the CFRA/FMLA leave if both of the following conditions occur:

- The employee fails to return from leave after the period of leave to which the employee is entitled has expired. An employee is deemed to have "failed to return from leave" if he/she works less than 30 days after returning from CFRA leave. However, an employee who retires during CFRA leave or during the first 30 days after returning is deemed to have returned from leave.
- The employee's failure to return from leave is for a reason other than the continuation, recurrence, or onset of a serious health condition that entitles the employee to CFRA leave, or other circumstances beyond the control of the employee.[77]

COBRA Qualifying Events and Family and Medical Leave

Taking family and medical leave is not a qualifying event for Consolidated Omnibus Budget Reconciliation Act (COBRA) purposes. However, an employee who does not return from such leave within available time limits or returns on a reduced schedule may be entitled to COBRA if eligibility for health benefits ceases.

See Chapter 17, "Health and Retirement Benefits," for more information.

Extension of FMLA/CFRA as a Reasonable Accommodation of a Disability

California's disability regulations, in effect since December 30, 2012, require employers to initiate an interactive process with an employee when the employee has a disability and has exhausted leave under FMLA and/or CFRA to ascertain whether additional leave would be an effective reasonable accommodation. For more information on the interactive process, see Chapter 28, "Disabilities in the Workplace."

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[76] *Rogers v. County of Los Angeles*, 198 Cal.App.4th 480 (2011)

[77] 29 CFR sec. 825.213(a) and (c

If an employee cannot perform the essential functions of a job, but has exhausted leave under FMLA and/or CFRA, an extension of leave may be a reasonable accommodation of the disability. To qualify as a reasonable accommodation, the leave must be likely to be effective in allowing the employee to return to work. An employer is not required to provide an indefinite leave of absence.[78]

Employers should not automatically terminate employees upon the exhaustion of FMLA and/or CFRA leaves of absence for the employee's own injury or illness. Initiate the interactive process and work with the employee and his or her doctor in an attempt to agree on a reasonable accommodation of any continuing disability.

Terminating Employees During Family and Medical Leave

Employees who abuse the leave of absence may be subject to disciplinary action, up to and including termination. For instance, if an employee requests five days of FMLA/CFRA leave to care for a parent who is recovering from surgery, but the employee is seen engaging in other activities that would prevent him/her from caring for the ill parent, you may have a reason to terminate the employee.

However, if the employee requested FMLA/CFRA leave to care for a child in the hospital but was actually at home caring for other children while his/her spouse was at the hospital with the ill child, you would probably not have sufficient reason to terminate the employee. The fact that the employee is entitled to leave and could have cared for the ill child in the hospital is enough to provide the employee protection under FMLA and CFRA.

Employees who violate company policy may also be terminated even if they are on a protected FMLA/CFRA leave. Employees on CFRA leave have no greater rights to continued employment than a current employee and can't violate company policy and expect protections.

However, employers should always exercise caution in this regard, because the employee may very well bring a retaliation or interference claim.[79]

You cannot interfere with an employee's FMLA/CFRA leave rights.[80] You cannot retaliate against an employee who takes family and medical leave. It is important to document any disciplinary or termination action taken against an employee using or returning from family and medical leave.

For example, an employee returns from FMLA and the employer receives numerous complaints from co-workers, supervisors and customers. The employer decides to place the employee on a performance improvement plan. If the plan is based on work-related issues, deficiencies or problems, the employee would find it difficult to claim retaliation for using FMLA.

Not everything that makes an employee unhappy can be used to bring a retaliation claim against an employer. The action taken has to do more than give an employee a chance to improve — it must discourage an employee from taking FMLA.

Don't terminate an employee during his/her leave or deny the employee's reinstatement based on misuse of leave or violation of company policy without a sufficient investigation and consultation with counsel.

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[78] [illegible]

[79] [illegible]

[80] [illegible]

Outside Employment and CFRA Leave

New 2016

An employee who is engaged in outside employment during family and medical leave in violation of employer policy may be subject to disciplinary action in certain circumstances. In fact, the California Supreme Court upheld an arbitration decision in favor of an employer that terminated an employee because the employee took on outside employment during CFRA leave, a violation of the company's policy.[81]

The case involved a car dealership employee who also owned a family restaurant as a side venture. In 2008, the employee went out on approved CFRA leave for a back injury. The company maintained a policy prohibiting employees from accepting employment with other companies while on CFRA leave, and sent the employee a letter informing him of the policy. He ignored the letter because he felt that it misstated company policy and that it did not apply to him because he was self-employed and not working with another company.

Concerned that the employee was violating company policy by working at the restaurant during his approved leave, the company sent employees to drive by or visit the restaurant. Reports came in that he was seen taking orders, acting as a cashier, sweeping and hanging a sign.

The employee acknowledged that he took orders and handled payments, but claimed they were limited, light-duty tasks approved by his doctor. The company fired the employee for engaging in outside employment while on CFRA leave. He sued, claiming that his right to reinstatement after CFRA leave was violated.

The company argued it was entitled to prevail if it had an "honest belief," even if mistaken, that the employee was abusing CFRA leave.

Because the facts were so strong supporting the employee's termination, the state Supreme Court declined to decide whether the honest belief defense applies in California employment law. Instead, the state Supreme Court upheld the decision in favor of the company because the employee was legitimately fired for violating the company's policy against outside work while on approved leave.

There was "overwhelming evidence" to support that finding and that the employee knew of the company policy against outside employment while on leave:

- The company explicitly warned the employee that its policy prohibited outside employment, including self-employment, while on leave;
- The employee knowingly ignored the warnings; and
- The company invited the employee to communicate regarding his outside employment, and he deliberately avoided such communications.

The honest belief defense is still unsettled in California under CFRA, although the Ninth Circuit, the federal appeals court interpreting FMLA cases in California, has held that the employer's good faith that its conduct violated FMLA is relevant only to the question of punitive damages under the FMLA, not to liability.[82] Employers are cautioned to not take disciplinary action against an employee on approved FMLA/CFRA leave unless there is clear, objective evidence of a policy violation and you have consulted legal counsel.

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[81] *Richey v. AutoNation, Inc.*, 60 Cal.4th 909 (2015)

[82] *Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112 (9th. Cir. 2001)

Penalties for Violating Family and Medical Leave Laws

Violating family and medical leave laws subjects employers to a civil lawsuit or administrative proceeding, and, under FMLA, supervisors may be personally liable. Employers are liable if they unlawfully interfere with an employee's exercise of FMLA rights.[83] Remedies available to the employee include all of the following:

- Financial awards to compensate for lost wages, benefits and other monetary losses and for emotional distress
- Punitive damages
- Reinstatement, promotion and back pay
- Court costs and attorneys' fees

An employer who willfully violates the FMLA posting requirements may be fined $110 for each separate offense. The only penalty for failing to post the CFRA notice is an order to post the notice.

FMLA Waivers

Under FMLA regulations, employees cannot waive prospective rights under FMLA. However, this does not prevent employees from settling or releasing claims under the FMLA based on past employer conduct.

Further Information

- For federal information, the U.S. Department of Labor created a toll-free telephone hotline at (866) 487-9243
- You can find the full text of the FMLA regulations on the U.S. Department of Labor's website at www.dol.gov/whd/fmla/finalrule.htm.
- The full text of the CFRA and its regulations can be found on the Department of Fair Employment and Housing's website at www.dfeh.ca.gov.

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[83] 29 USC sec. 2615(a)(2); 29 CFR sec. 825.220(a)(3)

Chapter 19

Pregnancy Disability Leave (PDL)

This chapter explains employer obligations to employees who are eligible for pregnancy disability leave only and provides a series of tasks to follow when an employee requests PDL or you become aware of the need for leave. This chapter does not apply to leaves also covered by family and medical leave laws.

Employers with five or more employees are covered by California's pregnancy disability leave law. Employers with more than 50 employees and with employees eligible for state or federal family and medical leave, will also need to follow the steps outlined in "Leave Interactions," in Chapter 18, page 499 when administering leaves related to pregnancy.

Employers should also note that paid sick leave is mandated beginning July 1, 2015. For more information, see Chapter 20, "Paid Sick Leave."

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In October of 2015, the Fair Employment and Housing Council submitted proposed Fair Employment and Housing Act regulations to the Office of Administrative Law for approval. These proposed regulations include changes relating to pregnancy disability leave. At the time of publication, these proposed regulations were still under consideration.

Covered employers	PDL is state law. Employers with five or more employees are covered.
Maximum amount of leave	The actual time designated as disability related to pregnancy is determined by the employee's health care provider. The maximum amount of time available is four months, or 17 1/3 weeks. Note that if an employee is disabled longer than four months, she may be entitled to a leave as a reasonable accommodation for her pregnancy-related or other disability. For more information, see"Reasonable Accommodation Beyond PDL" on page 524.
Employee eligibility	Employees who work for covered employers are eligible for PDL upon hire.
Reasons for leave	PDL can be used for any time the eligible employee is disabled by pregnancy, childbirth or a related medical condition.
Employer responsibilities	Post required posters, include a PDL policy in your employee handbook and send a notice to any employee who needs PDL.
Interaction with other leaves	Can run concurrently with federal Family and Medical Leave Act (FMLA) absences but not with California Family Rights Act (CFRA) absences. See Chapter 18, "Family and Medical Leave."
Ending the employment relationship before the leave expires	The employee cannot be subject to adverse employment action because she used PDL. Seek legal counsel before terminating anyone on PDL.
Return to work	The employee is entitled to reinstatement to the job she held before PDL began.

PDL Requirements

The following section explains your obligations to provide pregnancy disability leave (PDL), reasonable accommodation or a transfer to pregnant employees.

Employers Covered by PDL

If you employ five or more full-time or part-time employees, you must make PDL available to your employees. California state government, counties, cities and any other political or civil subdivision of the state must make PDL available, regardless of the number of employees.

Even if you employ fewer than five employees, you should consult legal counsel before terminating a pregnant employee. You may be found in violation of public policy, even if you are not technically covered by the law. California courts increasingly hold small employers responsible for violations of "public policy," meaning that small employers may be as responsible as large ones for following the law.

Employees Eligible for PDL

An employee disabled by pregnancy need not meet a length of service requirement before becoming entitled to PDL. A woman is eligible for PDL leave from her first day on the job.[1]

'Disabled by Pregnancy' Defined

A woman who is "disabled by pregnancy" is entitled to PDL. A woman is "disabled by pregnancy" if her health care provider deems that she is unable, because of pregnancy, to perform any one or more of the essential job functions of her job, or to perform any of these functions without undue risk to herself, the successful completion of her pregnancy or to other people. "Disabled by pregnancy" includes, but is not limited to, time when a woman suffers from severe morning sickness or needs time off for:[2]

- Prenatal or postnatal care
- Bed rest
- Gestational diabetes
- Pregnancy-induced hypertension
- Preeclampsia
- Postpartum depression
- Childbirth
- Loss or end of pregnancy
- Recovery from:
  - Childbirth
  - Loss or end of pregnancy

Her health care provider ultimately decides if a woman is disabled by pregnancy.

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[1] 2 CCR 11037

[2] 2 CCR 11035(f)

'Affected by Pregnancy' Defined

It is unlawful for an employer to refuse to provide reasonable accommodation or transfer for an employee "affected by pregnancy." This is a different definition than "disabled by pregnancy" for purposes of the PDL requirement and is a lower threshold for the employee to meet.

A woman is "affected by pregnancy" if — because of pregnancy, childbirth or related medical condition (or a condition related to pregnancy, childbirth or a related medical condition) — it is medically advisable for an employee to transfer or otherwise be reasonably accommodated by her employer.

Duration of PDL

A pregnant employee can take up to four months of leave, when disabled by her pregnancy. PDL generally is not paid leave.

The four months of leave is allowed for each pregnancy and is not an annual limit.

An employee who took time off in February and March early in a high-risk pregnancy and then miscarried would be entitled to a new leave of up to four months if she became pregnant again later that same calendar year.

You must provide up to four months of leave even if you maintain a policy or practice that provides less than four months of leave for other temporarily disabled employees. However, if you offer a more generous leave policy for other temporary disabilities, you must provide the more generous leave to employees temporarily disabled by pregnancy.

An employee may remain disabled at the end of four calendar months and request additional time off. In this situation, you must engage in the interactive reasonable accommodation process, under the Americans with Disabilities Act and California's Fair Employment and Housing Act.

Calculating PDL

Four months means the number of days an employee normally would work within four months:

- For a full-time employee who works five, eight-hour days per week, four months means 693 hours of leave (40 hours per week times 17 1/3 weeks).
- For a part-time employee who works 20 hours a week, four months means 346.5 hours of leave (20 hours per week times 17 1/3 weeks).
- For an employee who normally works 48 hours per week, four months means 832 hours of leave (48 hours per week times 17 1/3 weeks).

If an employee's schedule varies from month to month, a monthly average of the hours worked over the four months prior to the beginning of the leave shall be used for calculating the employee's normal work month.

Employees can take leave intermittently or on a reduced work schedule when medically advisable, as determined by the employee's health care provider. You can limit leave increments to the shortest period of time that your payroll system uses to account for absences or use of other leave, provided that the increment is not greater than one hour:

- For example, if employees must use vacation in 30-minute increments or more, you can require an employee who comes in 20 minutes late due to severe morning sickness to use 30 minutes of her PDL entitlement.

Holidays During PDL

If a holiday falls within a week taken as PDL, the entire week is still counted as a week of PDL. If your business activity temporarily ceases for some reason and employees generally are not expected to report for work for one or more weeks (a school closing for two weeks for the Christmas and New Year holidays or summer vacation, for example, or an employer closing the plant for retooling), the days your activities ceased do not count against the employee's PDL entitlement.

Example: Your company observes a holiday on President's Day. A pregnant employee is on PDL leave the entire week of the holiday. The holiday counts as a day for PDL purposes, even though your office was closed.

Example: Your company has a policy of closing for the entire week in which Independence Day falls. July 4th was on a weekday and your company shut down for the entire week. The week does not count as leave for PDL purposes.

Timing of PDL

A woman can take PDL at any time that her health care provider designates her as disabled by pregnancy, childbirth or related medical conditions. She can take leave at any time she is disabled during or after the pregnancy. She need not take all of her leave at once. The pregnant employee can take PDL intermittently, as in the case of morning sickness early in the pregnancy, followed months later by the birth of the child.

PDL is not designed for "baby bonding time" but to provide time off when a woman is disabled by her pregnancy. After she is no longer disabled, she is not entitled to PDL to stay at home with her new baby.

Employees eligible for family and medical leave can use such leave for baby bonding purposes. See Chapter 18, "Family and Medical Leave," for more information. Eligible employees can receive benefits while absent to bond with a child. See Chapter 15, "State Disability Insurance (SDI) and Paid Family Leave (PFL)," for more information on Paid Family Leave benefits. If the baby is ill and requires care, the employee can use accrued sick leave to care for the child. For more information, see Chapter 20, "Paid Sick Leave."

PDL Notice Requirements

Employers and employees both must follow notice requirements relating to PDL.

State law requires employers to post specific notices for employees explaining their right to leave for pregnancy disability. You must post the PDL notice in a conspicuous place where applicants and employees tend to congregate.

Employees must also give appropriate notice of the need for PDL to their employers.

Employer Posting and Notice Requirements for PDL

The required poster(s) depends upon how many employees your company has. Employers of five to 49 employees must post the "Notice A: Your Rights and Obligations As A Pregnant Employee" from the California Department of Fair Employment and Housing (DFEH). The poster is available in English or Spanish.

Pregnancy Disability Leave - Notice A - 5-49 Employees

Pregnancy Disability Leave - Notice A - 5-49 Employees - Spanish

The poster (Notice A) should include information about:

- An employee's right to request reasonable accommodation, transfer, or a pregnancy disability leave.
- Employees' notice obligations to provide advance notice to the employer if the employee needs reasonable accommodation, transfer, or a pregnancy disability leave.
- Any employer requirement that the employee provide medical certification of the need for pregnancy disability leave, reasonable accommodation, or transfer.

An electronic posting may be used to meet the posting requirement, as long as the electronic posting meets all the requirements of the law.

Employers with 50 or more employees (and thus covered by FMLA/CFRA leave laws) must post the *Family Care and Medical Leave and Pregnancy Disability Leave - Notice B - 50 or More Employees*. This poster is available in English or Spanish.

Family Care and Medical Leave and Pregnancy Disability Leave - Notice B - 50 or More Employees

Family Care and Medical Leave and Pregnancy Disability Leave - Notice B - 50 or More Employees - Spanish

An employer must also give an employee a copy of the relevant PDL notice as soon as practicable after the employee tells the employer of her pregnancy, or sooner if the employee inquires about reasonable accommodation, transfer or pregnancy disability leaves.[3] This is in addition to the posting requirements.

Employers with 50 or more employees must also give a copy of Notice A to an employee seeking PDL if the employee is not yet eligible for FMLA/CFRA.

If you employ 50 or more people, please also see Chapter 18, "Family and Medical Leave."

CalChamber's ***2016 California and Federal Employment Notices Poster*** includes the *Pregnancy Disability Leave - Notice A - 5-49 Employees* and the *Family Care and Medical Leave and Pregnancy Disability Leave - Notice B - 50 or More Employees*.

In addition to the required notification, California's DFEH provides informational brochures that you can distribute to employees. No legal requirement exists to distribute the DFEH brochures.

Pregnancy Discrimination Brochure

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[3] 2 CCR 11049(d)(2)

Requirements for Non-English Speaking Employees

If 10 percent or more of your work force at any location have a primary language other than English, you must translate the notice (Notice "A" or "B") into the language or languages spoken by the group(s) of employees.

You must also make a reasonable effort to give either verbal or written notice in the appropriate language to any employee who you know is not proficient in English, and for whom written notice was not previously given in her primary language. Once you know the employee is pregnant, provide verbal or written notice, including information about pregnancy disability leave, reasonable accommodation, and transfer.

Employee Handbooks and PDL

If you publish an employee handbook that describes other types of reasonable accommodation, transfers or temporary disability leaves, you are encouraged to include a description of pregnancy disability leave (including reasonable accommodation and transfers) in the next edition of your handbook.

Alternatively, you may give employees a copy of the appropriate notice (Notice "A" or "B") at least annually. The annual notice may be by electronic mail.

Employee Request for PDL

An employee must provide at least verbal notice to make you aware that she needs a PDL, reasonable accommodation or transfer, and the anticipated timing and duration of the leave, reasonable accommodation or transfer.

If the need for the leave or transfer is foreseeable, an employee must provide you with at least 30 days' advance notice before a leave, reasonable accommodation or transfer is to begin. The employee must consult with you and make a reasonable effort to schedule any planned medical treatment or supervision so as to minimize disruption to your operations. Any scheduling must be approved by the employee's health care provider.

If 30 days' advance notice is not possible due to a lack of knowledge of when the leave, reasonable accommodation or transfer will begin, a change in circumstances or a medical emergency, or other good cause, the employee must notify you as soon as possible.

You cannot deny a pregnancy disability leave, reasonable accommodation or transfer that is an emergency or is otherwise unforeseeable on the basis that the employee did not provide advance notice of the need for the leave, accommodation or transfer.

Responding to a Request for PDL

You must respond to a request for pregnancy leave, reasonable accommodation or transfer request as soon as possible, but no later than 10 calendar days after receiving the request. If the pregnancy leave would also qualify as a leave under the FMLA, you must respond no later than five (5) business days, unless there "extenuating circumstances" exist.[4] You should attempt to respond to the leave request before the date the leave is due to begin. Once the request for leave has been approved, it is retroactive to the first day of the leave.

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[4] 29 C.F.R. § 825.300(d)((1)

You are required to give a copy of "Notice A" (Your Rights and Obligations as a Pregnant Employee) or "Notice B" (if applicable) as soon as practicable, to any employee who requests a pregnancy disability leave, a transfer, or reasonable accommodation.

Employee Letter - PDL Only

FMLA PDL - Designation Notice

Family Care and Medical Leave and Pregnancy Disability Leave - Notice B - 50 or More Employees

Family Care and Medical Leave and Pregnancy Disability Leave - Notice B - 50 or More Employees - Spanish

Medical Certification

You can require medical certification as a condition of granting a reasonable accommodation, a pregnancy disability leave or a transfer. You must advise the employee of all of the following:

- The need to provide medical certification.
- The deadline for providing the certification.
- What constitutes medical certification.
- The consequences for failing to provide the required certification.

Medical Certification for Reasonable Accommodation or Transfer

A medical certification for a reasonable accommodation or transfer request is sufficient if it contains all of the following information:[5]

- A description of the requested reasonable accommodation or transfer.
- A statement that describes the medical advisability of the reasonable accommodation or transfer because of pregnancy.
- The date on which the need for reasonable accommodation or transfer became/will become medically advisable and the estimated duration of the reasonable accommodation or transfer.

Medical Certification for Pregnancy Disability Leave

A medical certification is sufficient for pregnancy disability leave if it states:[6]

- The employee needs to take pregnancy disability leave because she is disabled by pregnancy, childbirth, or a related medical condition.
- The date on which the employee became disabled because of pregnancy and the estimated duration of the leave.

Certification of Health Care Provider for Pregnancy Disability Leave Transfer Or Reasonable Accommodation

You may not request additional information other than that listed above and must accept a medical certification if it meets the requirements stated. If additional time is requested beyond the original medical certification date, you may require recertification of a need for an extended period of reasonable accommodation, transfer or pregnancy disability leave.

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[5] 2 CCR 11050 (b)(6)

[6] 2 CCR 11050 (b)(7)

Other Certification Requirements

If you require medical certification, you have two business days after the employee requests leave, transfer, or reasonable accommodation to request that the employee furnish you with a medical certification.

If the leave is foreseeable — and at least 30 days' notice has been provided — the employee must provide the medical certification before the leave begins, unless it is not practicable. If not practicable, medical certification must be provided within the time frame you give, which must be at least 15 calendar days after you make the request. If this is not practicable under the circumstances, and the employee has made a diligent, good faith effort to provide the medical certification, you should provide additional time to the employee.

Additionally, if any medical certification provided by the employee is incomplete or inadequate, you must advise the employee of such, and give her a reasonable amount of time to provide sufficient medical certification.

California's new mandatory paid sick leave law became effective on July 1, 2015. This law is silent as to whether you can ask for a doctor's note if the employee requests to use this accrued paid sick leave. Certification requirements in other leave laws may still apply. However, the interaction of the new paid sick leave mandate with other leave laws is uncharted territory. For more information, see Chapter 20, "Paid Sick Leave."

You or the employee may choose to substitute sick, vacation, personal or family leave for unpaid pregnancy disability leave. In that case, you are limited in the medical certification requirements that may be imposed. If your sick or medical plan medical certification requirements are less stringent than the medical certification requirements for pregnancy disability leave, transfer and reasonable accommodation, you may require only the less stringent medical certification.

When you advise the employee of the need for medical certification, you must also advise the employee of any consequences if she does not provide adequate medical certification.

If a leave, transfer or reasonable accommodation is foreseeable and the employee has not provided sufficient medical certification, you may delay granting the employee's request until such time as the certification is provided.

You can use the *Certification of Health Care Provider - PDL or PDL/FMLA* to obtain certification that the employee is disabled due to pregnancy. Keep the form in the employee's confidential medical file, separate from her personnel file.

You can use the *Certification of Health Care Provider For Pregnancy Disability Leave Transfer Or Reasonable Accommodation* to obtain certification of a need for transfer.

Any medical information you receive about an employee is protected by confidentiality laws and should be retained in a confidential medical file separate from the employee's regular personnel file. For more information, see "Keeping Medical Information Private," in Chapter 8, page 133.

Health Care Provider Defined for PDL

A health care provider is a medical or osteopathic doctor, physician, or surgeon, licensed in California or in another state or country, who directly treats or supervises the treatment of the employee's pregnancy, childbirth or a related medical condition.[7]

Other health care providers who can provide medical certification include the following persons when directly treating or supervising the treatment of the employee's pregnancy, childbirth or related medical condition:

- Marriage and family therapists
- Acupuncturists
- Nurse practitioners,
- Nurse midwives and licensed midwives
- Clinical psychologists
- Clinical social workers
- Chiropractors
- Physician assistants
- A health care provider from whom an employer or a group health plan's benefits manager would accept medical certification of the existence of a health condition to substantiate a claim for benefits

Notice to Employee as to Change in Relationship for PDL

You must provide written notice to an employee at the beginning of the PDL leave. The notice is to clarify that the employee's status has changed and she is on a leave of absence.

Notice to Employee as to Change in Relationship

Providing Reasonable Accommodation and Transfers

A reasonable accommodation may be required when an employee is affected by pregnancy and needs a change in the work environment or job duties to enable her to perform the essential functions of her job. The employee only needs to be *affected* by pregnancy, not *disabled* by pregnancy, for reasonable accommodation and transfer requests to apply. The request for reasonable accommodation must be based on the advice from the employee's health care provider. The requested accommodation must be reasonable. For more information, see "'Affected by Pregnancy' Defined" on page 517.

The "reasonableness" of a requested accommodation should be made on a case-by-case basis, and take into consideration factors such as the employee's medical needs, the duration of the requested accommodation, and the employer's past and current practices.

The employer and the employee should engage in a good faith interactive process to address the employee's request for reasonable accommodation. For more information, see Chapter 28, "Disabilities in the Workplace."

Reasonable accommodation may include, but is not limited to:

- Modifying work practices or policies
- Modifying work duties
- Modifying work schedules to permit earlier or later hours

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7. 2 CCR 11035(n)

- Permitting more frequent breaks
- Providing furniture or acquiring or modifying equipment or devices
- Providing a reasonable amount of break time and use of a room or other location in close proximity to the employee's work area to express breast milk in private

A request for reasonable accommodation does not impact or reduce the employee's right to up to four months of pregnancy disability leave, unless the accommodation involves a reduction in work hours or intermittent leave. If the accommodation is a reduction in work hours or intermittent leave, the time missed is considered pregnancy disability leave, and may be deducted from the employee's PDL.

An employer may request a medical certification substantiating the need for reasonable accommodation. For more information, see "Medical Certification" on page 521.

Reasonable Accommodation Beyond PDL

An employee may continue to be disabled beyond the four months of pregnancy disability leave. Whether the disability is related to the pregnancy or to another physical or mental disability, reasonable accommodation in the form of an extension of leave may be required. Recently enacted PDL regulations specifically provide that the right to four months of pregnancy disability leave is "separate and distinct" from the right to take a leave of absence as a form of reasonable accommodation for a disability.

The determination as to whether additional leave is necessary requires an individual evaluation to determine whether the additional requested leave is reasonable; would be effective in allowing the employee to return to work at the end of the leave; and whether the leave would cause the employer undue hardship.

For more information see Chapter 28, "Disabilities in the Workplace."

"At the end or depletion of an employee's pregnancy disability leave, an employee who has a physical or mental disability (which may or may not be due to pregnancy, childbirth, or related medical conditions) may be entitled to reasonable accommodation under Government Code section 12940." The duty to accommodate an employee and provide additional leave under the Fair Employment and Housing Act (FEHA) needs to be determined on a "case-by-case basis" and "is not diminished by the employee's exercise of her right to pregnancy disability leave."[8]

A California court of appeal reached the same conclusion as the regulations, ruling that an employee who used her entire four months of PDL may still be entitled to additional leave under the FEHA's separate provisions requiring reasonable accommodation of disabilities and protection from pregnancy discrimination.[9]

In *Sanchez v. Swissport, Inc.*, an employee had a high-risk pregnancy requiring bed rest for the entire duration of the pregnancy. The employee took the entire amount of PDL allowed by law, her available leave under the California Family Rights Act (CFRA) and accrued vacation. After using all this time, she still had approximately three months until the anticipated October delivery of her baby.

Swissport terminated her in July. The employee filed a lawsuit against the company, alleging pregnancy discrimination and failure to accommodate. She claimed that Swissport did not contact her or try to engage in a good faith interactive process to determine whether there were any available accommodations for her continuing disability, including extension of her leave.

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[8] 2 CCR sec. 11044

[9] *Sanchez v. Swissport, Inc.*, 213 Cal.App.4th 1331 (201

The court of appeal ruled that an employee who is disabled by pregnancy is entitled to the four-month PDL leave entitlement in addition to other rights afforded by FEHA, including the right to a reasonable accommodation of her disability so long as the reasonable accommodation does not impose an undue hardship on her employer. This reasonable accommodation may include an extended leave of absence beyond PDL.

The court also noted that the employee is entitled to FEHA's protections against discrimination. California law prohibits employment discrimination on the basis of sex, including pregnancy, childbirth, breastfeeding and related medical conditions.

Employers should not rule out the possibility of additional leave time for an employee who has exhausted PDL but is still unable to work.

When a Pregnant Employee Requests a Transfer

If you have a policy, practice or collective bargaining agreement that requires or authorizes transfers for temporarily disabled employees to "light duty" positions for the duration of a disability (whether work-related or not), you must provide the same for an employee affected by pregnancy who requests a transfer.

You must grant the request of an employee affected by pregnancy to transfer to another position if the employee's health care provider advises that the transfer is medically advisable and if the transfer can be reasonably accommodated.

You can accommodate a transfer request by transferring another employee, but there is no obligation to do so.

You are not required to:

- Create additional employment that you would not otherwise have created
- Discharge another employee
- Violate a collective bargaining agreement
- Transfer another employee with more seniority
- Promote or transfer any employee not qualified to perform the new job

An employer may request a medical certification substantiating the need for the transfer. For more information, see "Medical Certification" on page 521.

A recent decision from the U.S. Supreme Court serves as a good reminder to employers of their duty to accommodate pregnant workers, including transferring pregnant employees to light duty positions when reasonable.[10]

Note that this case was decided under federal law, not under California state law which already provides strong protections to pregnant workers, imposes a duty to accommodate on employers, and clearly defines the duty to transfer in its regulations.

Peggy Young, a former UPS driver, filed a pregnancy discrimination lawsuit against UPS. Young was employed as a part-time "air driver" for UPS, a position that required her to lift packages. In 2006, she became pregnant. She was placed on restriction to only lift up to 20 pounds during the first 20 weeks of her pregnancy and only up to 10 pounds thereafter.

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[10] *Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338 (2015)

Young was informed that she did not qualify for "light duty" accommodations, such as clerical work, and was not allowed to return to work. UPS did accommodate workers who had on-the-job injuries with light duty assignments but did not offer light duty to employees with medical conditions unrelated to work injuries.

Young sued UPS, claiming that UPS acted unlawfully in refusing to accommodate her pregnancy-related lift restriction, even though the company accommodated other drivers who were "similar in their ... inability to work."

UPS argued that it offered light duty only in specific circumstances: on-the-job injuries, Americans with Disabilities Act claims and when drivers lost their Department of Transportation certificates.

Since Young did not fall within any of those categories, UPS argued that it did not discriminate against her on the basis of pregnancy but treated her just as the company treated all other relevant persons.

The U.S. Supreme Court disagreed and allowed Young to proceed with her pregnancy bias claim against UPS.

If the facts are as Young presented them, the Court explained, Young can "show that UPS accommodates most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations."

When an Employer Requires a Pregnant Employee to Transfer

If it is medically advisable, because of pregnancy, for an employee to take intermittent leave or leave on a reduced work schedule, you can require the employee to transfer temporarily to an available alternative position that meets the employee's needs.

- This alternative position must have the equivalent rate of pay and benefits.
- The employee must be qualified for the position.
- The position must better accommodate the employee's leave requirements than her regular job.

The alternative position need not consist of equivalent duties. Transfer to an alternative position can include altering an existing job to better accommodate the employee's need for intermittent leave or a reduced work schedule.

When the employee's health care provider certifies that there is no further medical advisability for a transfer, intermittent leave or leave on a reduced work schedule, the employer must reinstate the employee to her same or comparable position.

Pay and Benefits During PDL

You are not required to pay an employee on PDL unless you pay for other temporary disability leaves for similarly situated employees.

Disability Insurance and PDL

An employee on PDL may be eligible for State Disability Insurance (SDI) benefits during the time she is disabled by pregnancy. SDI benefits are limited to the time the employee is actually disabled. They do not include payments during periods of baby bonding.

For the purpose of SDI benefits, the usual disability period for a normal pregnancy is up to four weeks before the expected delivery date and up to six weeks after the delivery date. The physician may certify a longer period of disability if the delivery is by cesarean section, if medical complications exist or if the employee cannot perform her regular or customary job duties. For more information, see Chapter 15, "State Disability Insurance (SDI) and Paid Family Leave (PFL)."

SDI, Workers' Compensation and PDL

Though it is possible that a pregnant employee could suffer a work-related illness or injury that puts her health or that of her child in jeopardy, the employee would not receive payments from SDI and workers' compensation concurrently.

- The employee's health care provider determines if the employee is disabled by pregnancy, childbirth or a related medical condition, in which case she might be eligible for SDI payments.
- Your workers' compensation physician makes the determination as to whether the employee suffered a work-related illness or injury, in which case she is eligible for workers' compensation payments.

Paid Family Leave (PFL) and PDL

PFL benefits are intended to compensate employees who must care for a family member or who want to bond with a new child. The employee on PDL would not be eligible for PFL benefits while disabled by pregnancy and receiving SDI. However, she could apply for up to six weeks of PFL benefits to bond with the new child after she is no longer disabled and after she is no longer receiving SDI.

PFL is not a leave of absence. If an employee is eligible only for PDL, she will not be entitled to additional time off for baby bonding. You can implement a policy that provides additional time off for baby bonding, with or without guaranteeing job protection.

Most California employees are eligible for SDI and PFL benefits. For more information, see Chapter 15, "State Disability Insurance (SDI) and Paid Family Leave (PFL)."

Sick Leave and PDL

You can require, or the employee may choose to use accrued sick leave during the otherwise unpaid portion of PDL. You can also require or permit the use of sick leave benefits to supplement SDI benefits. In other words, you can integrate and coordinate the sick leave benefit with SDI as long as the employee does not receive more than 100 percent of her wages. For more information, see Chapter 15, "State Disability Insurance (SDI) and Paid Family Leave (PFL)."

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California employers were required to begin providing mandatory paid sick leave benefits on July 1, 2015 (Healthy Workplaces, Healthy Families Act). Mandatory paid sick leave may be treated the same as optional employer provided sick days were treated in the past. In other words, you could require or the employee could choose to use the mandatory paid sick leave during unpaid PDL.

The interaction of the new paid sick leave mandate with other leave laws is uncharted territory and not specifically addressed by the Act.

Vacation, Paid Time Off (PTO) and PDL

You cannot require the use of vacation or other accrued personal paid time off (PTO) for PDL. An employee can use vacation or PTO during her PDL, at her option.

Seniority and PDL

During PDL, the employee is entitled to accrual of seniority to the same extent and under the same conditions as would apply to any other unpaid leave not related to pregnancy. If your policy or state or federal law allow seniority to accrue when employees take paid leave, such as paid sick or vacation leave, and when employees take unpaid leave, then seniority accrues during any part of a paid and/or unpaid PDL, consistent with your policy.

You cannot consider PDL a break in service. An employee must return from PDL with at least as much seniority (for purposes of layoff, recall, promotion, job assignment and seniority-related benefits, such as vacation) as she had when she began her leave.

Benefits and PDL

An employer who currently pays for health insurance under a group health plan (medical, dental, vision) must continue to maintain a pregnant employee's coverage under the plan as if she was actively working.[11]

Health benefits must be continued for the duration of the PDL up to a maximum of four months in a 12-month period, beginning the date the leave begins. You may choose to maintain and pay for coverage for longer than four months. However, you should consult with your health care provider to ensure continued coverage is available under your plan(s).

Dropping group health coverage for an employee still considered a full-time employee (because, for example, a pregnant employee is taking further leave as a reasonable accommodation for a disability) may violate the Affordable Care Act's requirements to provide a full-time employee with minimum essential coverage. Consult with legal counsel before dropping health insurance coverage.

If the employer is a state agency, the collective bargaining agreement governs the continuation of health care under the employer's group health plan.

You cannot use the time that you maintain and pay for group health coverage during PDL to meet your obligation to pay for 12 weeks of group health coverage during leave that is also CFRA. For more information, see Chapter 18, "Family and Medical Leave."

The employer must provide the coverage at the same level and under the same conditions that coverage would have been provided had the employee continued active employment. If the employee contributed to the group plan premium before taking PDL, she must continue to pay her portion while on leave.

However, if you provide greater benefits for other temporary disability leaves, you must provide them for pregnancy leave to the same extent and for the same length of time.

At the time the leave begins, provide the employee with written notice as to which benefits you provide, and, if applicable, the amount the employee must pay for those benefits and how and when she must make those payments for her benefits to continue. If the employee normally pays a portion of the insurance premium, he/she should pay his/her share of the premium to you monthly by cash or check, because payroll deductions are not possible for an unpaid leave. Ask the employee to sign a notice acknowledging she will not continue receiving benefits if she does not make the payments for continued benefits.

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[11] Govt. Code sec. 12945

Recovering Premiums

You can recover premiums that you already paid if both of the following conditions are met:[12]

- The employee fails to return from leave after the designated leave period expires; and
- The employee's failure to return from leave is for a reason other than one of the following:
  - The employee is taking leave under the California Family Rights Act (CFRA), unless the employee chooses not to return to work following the CFRA leave.
  - The continuation, recurrence or onset of a health condition entitles the employee to pregnancy disability leave, unless the employee chooses not to return to work following the leave.
  - Non-pregnancy related medical conditions require further leave, unless the employee chooses not to return to work following the leave.
  - Any circumstances beyond the control of the employee, including, but not limited to, circumstances where the employer is responsible for the employee's failure to return (the employee is not returned to her same position or to a comparable position), or when the employee must care for herself or a family member (such as the employee gives birth to a child with a serious health condition).

Eligibility for Other Benefits

An employee on PDL is entitled to participate in the following, to the same extent and under the same conditions as would apply to any other unpaid disability leave granted by the employer for any reason other than a pregnancy disability:

- Employee benefit plans, including life, short-term and long-term disability or accident insurance
- Pension and retirement plans
- Stock options
- Supplemental unemployment benefit plans

Benefits After an Employee Returns from PDL

Benefits must be resumed upon the employee's reinstatement in the same manner and at the same levels as provided when the leave began, without any new qualification period, physical exam, etc.

Returning to Work After PDL

When you grant an employee's request for PDL, you must guarantee to reinstate the employee to the same position or to a comparable position in some circumstances. This guarantee must be put in writing if the employee requests a written guarantee. You can refuse to honor the guarantee of reinstatement only under very limited circumstances.

Under most circumstances, you must reinstate an employee returning from PDL to the same job she held before the leave, with no less seniority than she had when her PDL began. This includes seniority for the purposes of layoff, recall, promotion, job assignment and seniority related benefits, such as vacation.

You must resume benefits upon the employee's reinstatement in the same manner and at the same levels as provided when the leave began without any new qualification period, physical exam, etc.

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[12] 2 CCR 11044(c)(3)

If the employee is not released to return to work before the leave expires, you must treat the employee the same as you treat any other similarly situated employee regarding reinstatement.

If an employee returning from PDL is disabled by an injury or illness unrelated to the pregnancy or childbirth, she may be entitled to reasonable accommodation.

An employee who recently gave birth can request to return to a different job or a different schedule. An employee returning from PDL is not entitled to any special consideration for such requests. Treat her request the same as you would any other employee request for a change in hours or position.

Requiring a Release Before Returning to Work from PDL

You can require the employee to obtain a "return to work" release from her health care provider as a condition of the employee's return to work from PDL. The release should state that the employee is able to resume her original job duties and the date she is able to return. You can only do this if you maintain a uniformly applied practice or policy of requiring releases from other employees returning to work after a leave not related to a pregnancy disability.

You can use the *Certification of Health Care Provider for Employee Return to Work* to obtain this release. Keep the form in the employee's confidential medical file, separate from her personnel file.

Certification of Health Care Provider for Employee Return to Work

Refusing Reinstatement to the Same Position After PDL

It is possible to refuse reinstatement when the employee requests it if the employee would not have been employed in her same position due to legitimate business reasons, such as a layoff due to a plant closure, unrelated to the employee taking the PDL or a transfer. An employee has no greater right to reinstatement to the same position than if the employee had been continuously employed in this position during the PDL.

If an employee is laid off during PDL or a transfer for a legitimate business reason, your responsibility to continue the PDL or transfer, maintain benefits and reinstate the employee ceases at the time the employee is laid off. However, if you have obligations under a collective bargaining agreement (CBA), the terms of the CBA must be followed.

A layoff can be a legitimate reason to not reinstate an employee, but proving that an employee would have been laid off regardless of whether she took PDL may be difficult.

If you are considering refusing to reinstate an employee after she takes PDL by showing that she would have been laid off, consult with legal counsel to make sure you can meet the burden of proof required.

The following scenarios are not valid reasons to refuse to reinstate an employee after PDL:

- You distributed the duties of an employee on PDL to several other employees and found they could handle the additional work.
- You hired a temporary employee to do the duties of the employee on PDL and found the temporary employee did a better job.
- You found it necessary to lay off one person from the department and because the employee on PDL was already out of the workplace, you selected her for the layoff.

- You have heard through others (or from the employee herself) that the employee considered not returning to work at the end of her leave.

Returning from PDL to a Comparable Position

Even if you are excused from returning an employee to the same position, there may be an obligation to return her to a comparable position that is available. A position is "available" if it is open on the employee's scheduled return date or within 60 calendar days thereafter; and the employee is qualified for the job or is entitled to the job by company policy, contract or collective bargaining agreement.

You are responsible for providing notice to the employee of available positions. Notice can be in person, by letter, telephone, email or links to postings on your company's website if there is a section for job openings.

If a comparable position is not available on the employee's scheduled return to work date, but the employee does return to work during the 60 calendar day period, the time between the scheduled return date and the actual reinstatement date is not counted for purposes of any employee pay or benefit.

Reinstating an Employee After More Than Four Months

If an employee takes PDL for longer than four months, you must give the employee the same reinstatement rights as you would give any other similarly situated employee taking a disability leave of similar length. For example, if your policy allows reinstatement to other temporarily disabled employees who take a disability leave of six months, you also must allow reinstatement to a woman disabled by pregnancy for six months.

Reinstating an Employee After a Transfer and PDL

When the employee's health care provider certifies that there is no further medical need for the transfer, intermittent leave or leave tied to a reduced work schedule, you must reinstate her to the same or comparable position held before the transfer. See "Returning to Work After PDL" on page 529 for more information on reinstatement rights after PDL. The same reinstatement rights apply whether an employee takes leave or is transferred.

Pregnancy Discrimination

It is unlawful to discriminate against or harass employees because of pregnancy or perceived pregnancy.[13] It is also unlawful to retaliate against an employee because of pregnancy, perceived pregnancy or because she exercised her right to take a pregnancy disability leave or to seek reasonable accommodation. For more information, see "Pregnancy," in Chapter 26, page 732.

Discrimination protections also include "perceived pregnancy," defined as being regarded or treated by an employer as being pregnant or having a related medical condition.[14]

Employer Loses Pregnancy Discrimination Case

In *Sasco Electric v. California Fair Employment and Housing Commission*, an employer assumed that a pregnant employee working on a yacht would not be able to perform her job. The employer did not review a medical certification stating that the employee could safely perform her job and did not discuss any proposed future accommodation with the employee. Instead, the employer chose to lay off the pregnant employee. After the layoff, the employer replaced the experienced female employee with two males with no experience.

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[13] 2 CCR 11043(c)
[14] 2 CCR 11035(r)

The employer was ordered by a court to pay back pay, emotional distress damages and an administrative fine amounting to more than $110,000. The court upheld an award of back pay up to the date of the birth of the employee's child, as well as $85,000 for emotional distress and a $25,000 fine. The court said the fine was appropriate because the company contrived a reduction in force to justify laying off the pregnant employee and thus demonstrated willful, intentional and purposeful discrimination.[15]

Penalties for Failing to Comply with PDL Laws

An employee who is discriminated against because of her pregnancy may be entitled to any or all of the following remedies:

- Hiring
- Reinstatement
- Promotion
- Admission or re-admission to a labor organization
- Damages for lost wages and benefits
- Emotional distress damages
- Punitive damages
- Attorneys' fees and costs

In addition, the Department of Fair Employment and Housing (DFEH) may file a complaint on behalf of any person discriminated against.

Employees Expressing Breast Milk at Work

California law requires you to reasonably accommodate employees who want to express breast milk at work.[16] The law requires you to provide a reasonable amount of break time for employees to express breast milk. You also must provide the use of a private place to express breast milk, other than a toilet stall, in close proximity to the employee's work area. The employee's normal work area can be used if it allows the employee to express milk in private.

Employees can be required to use the paid rest break time you have already provided. If the employee needs a reasonable amount of additional time beyond the normal paid rest break for expressing milk, the time must be provided, but it can be unpaid. Employees can also choose to use lunch break time to express breast milk, but this does not relieve you of your responsibility to provide reasonable rest break time as explained above.

The Labor Commissioner may issue a citation if you violate this law, subjecting you to a civil penalty of $100 for each violation.

The Patient Protection and Affordable Care Act of 2010 (HR 3590) amended the Fair Labor Standards Act (FLSA) to provide reasonable break time for an employee to express breast milk for her nursing child for one year after the child's birth, each time that the employee has need to express the milk. The federal law also requires that employers provide a place for this purpose that is not a bathroom, but that is shielded from view and free from intrusion. Employers are not required to pay for the break time that is used for this purpose.

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[15] *Sasco Electric v. Cal* [illegible] *Commission*, 176 Cal App. 4th. 532 (2009)

[16] Lab. Code secs. 1030-1033

Generally, employers that are covered by the FLSA and employ 50 or more employees are required to comply with the federal law. Where the state law is more protective, employers should comply with state law, too. Under state law, an employer is exempt from the law only if operations would be seriously disrupted by providing break time to employees to express breast milk. The federal law provides an exemption for employers with fewer than 50 employees, if providing the breaks would impose an undue hardship in terms of difficulty or expense. Employers should consult with legal counsel if they have questions regarding compliance with state or federal law.

Employers should also be aware that the definition of "sex" under the state Fair Employment and Housing Act includes "breastfeeding and medical conditions related to breastfeeding." Employers are clearly prohibited from discriminating against employees or job applicants because of breastfeeding and related medical conditions.[17]

Further Information

Obtain a copy of California's pregnancy disability leave regulations from the DFEH by any of the following three methods:

1. Call the DFEH at (800) 884-1684 or (916) 478-7251
2. Write to:
   2218 Kausen Drive, Suite 100
   Elk Grove, CA 95758
3. Go to the California Code of Regulations online at ccr.oal.ca.gov (look up Title 2, Division 4, Chapter 2, Subchapter 6A).

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[17] Govt Code sec. 12926

Chapter 20

Paid Sick Leave

With the enactment of the Healthy Workplaces, Healthy Families Act of 2014 (the Act), California became the second state in the nation, after Connecticut, to mandate sick leave.[1] The effective date for employers to begin providing the paid sick leave (PSL) benefit was July 1, 2015. However, other requirements took effect on January 1, 2015.

Employers are now required by law to provide a set amount of PSL to employees working in California. Up until this time, you were not required to provide PSL to employees unless your business was in the City and County of San Francisco. Although many employers chose to offer paid or unpaid days off for employees to use when they were ill, there was no legal requirement.

The Healthy Workplaces, Healthy Families Act is a complex law with many subtleties and some existing ambiguities; employers with specific questions about the application of this law to their particular workforce should consult legal counsel.

Sick leave, including mandatory PSL, is not considered a form of wages.

It is especially recommended that employers create a written policy showing compliance with the mandatory PSL law.

CalChamber's ***Employee Handbook Creator*** can help you easily create an employee handbook that contains these policies. Purchase at the CalChamber store at store.calchamber.com.

Although the Act establishes minimum requirements, employers have the option to provide more time off than the minimum required under the Act.

The Act establishes minimum requirements pertaining to paid sick days. It does not pre-empt, limit, or affect the applicability of other laws, regulations, requirements, policies, or standards that provide for greater accrual or use by employees of sick days, whether paid or unpaid, or that extend other protections to an employee. The provisions of this law are in addition to, and independent of, any other rights under any other law. Employers can provide more generous leave than what the new law provides.

Use the *Paid Sick Leave Checklist* to assist you in reviewing business practices.

Paid Sick Leave Checklist

The Legislature passed additional amendments to the Act that became effective on July 13, 2015. The most significant amendments affected the various accrual provisions and how you pay employees for the time off.

In addition, the state Labor Commissioner's office has published a list of answers to frequently asked questions about the mandatory PSL law. The answers are not binding, but do offer guidance as to the Commissioner's enforcement position.

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[1] [illegible]

California Paid Sick Leave: Frequently Asked Questions

Employers Covered Under the Mandatory Paid Sick Leave Law

The PSL mandate applies to all employers, regardless of size. There is no small employer carve-out. The mandate applies to public and private employers, and for-profit and not-for-profit companies.

Employer is defined as: "any person employing another under any appointment or contract of hire and includes the state, political subdivisions of the state, and municipalities."

Employees Entitled to the Benefit

All employees who, on or after July 1, 2015, have worked in California for the same employer for 30 or more days within a year from the commencement of employment will be entitled to PSL. There are only limited exceptions.

New 2016

The legislative analysis of recent amendments to the Act states that the 30 days of work must be for the same employer to qualify for accrued sick leave. In other words, an employee is not eligible for PSL until he/she works for your business for 30 days within a year of the start of employment.

The right to accrue and take paid sick leave took effect July 1, 2015.

Part-time and full-time employees are covered. Exempt and nonexempt employees are also covered. Temporary, seasonal and even out-of-state employees can be covered too, if they spend enough time working for your business here in California.

> **Example:** You are a large employer with offices in many states. You have workers that reside in Oregon and work mainly out of your Oregon office. However, one of your Oregon workers comes to your home office in California to work for one week out of every month; that employee will be covered under the PSL law because the employee will be here for 30 or more days in a year.

Many existing sick leave or PTO policies don't provide paid leave to part-time employees, but part-time employees are eligible for PSL under the Act.

The following five groups of employees are not covered by the Act and are not entitled to the benefit:

- Employees covered by a collective bargaining agreement that provides for sick leave, has binding arbitration and meets other requirements, including a regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate
- Construction employees under a collective bargaining agreement
- Providers of publicly funded in-home supportive services under certain sections of the Welfare and Institutions Code, including sections 14132.95, 14132.952, 14132.956
- Certain air carrier employees who are provided time off that is equal to what is provided under the new law
- Specified public retired annuitants (per 7/13/2015 amendments)

If you think you meet one of the exceptions, consult legal counsel before deciding not to comply with the PSL law.

Calculating Leave - Employer Options

The amount of sick leave an employee can earn and/or carry over will vary depending on how the employer decides to handle the provision of leave. The Act provides employers with various options in which to satisfy the requirement to provide employees with PSL.

Employers can choose between four different accrual methods and one lump-sum method that avoids accrual and carryover requirements. With the accrual methods, employers will also want to examine the option to cap accrual of paid sick time within the limits of the Act.

The following are the five options:

- The statutory mandated accrual method;
- An optional accrual method that provides no less than 24 hours by the 120th day;
- An alternative accrual method for new hires;
- A pre-existing employer policy (a policy in effect prior to January 1, 2015); or
- A lump-sum approach

Employers who use one of the first four accrual options will also want to consider placing a cap on the maximum amount of paid sick time that can be accrued. For more information, see "Cap On Accrual" on page 540.

Employers that provide specific sick leave or annual leave benefits to specified state employees or officers by statute or the provisions of a memorandum of understanding will also meet the requirements of the paid sick day law.

An employer can, of course, choose to have a more generous plan, allowing the employee to use and accrue more than the minimum amounts required under the Act.

The PSL mandate does not change an employer's obligation to comply with a contract, collective bargaining agreement, employment benefit plan or other agreement providing more generous sick days to an employee than required by the mandate.

You do not have to pay out sick leave at termination, but you do have to pay out PTO. If you elect to provide PTO instead of sick leave, you will need to pay out any unused, accrued PTO when employment ends. For more information, see "Employee Leaves Employment and Reinstatement" on page 544 and "Paid Time Off" on page 564.

Companies will need to decide which approach works best for their needs. Whichever method is used, check eligibility and usage requirements in your policy. For example, make sure that all workers are covered, not just full-time employees. Review your policies to ensure that sick leave can be used for all the same purposes and meets all the same conditions specified under the Act. Adjustments to existing policies may be necessary.

Consult legal counsel with any questions regarding implementing sick leave and PTO policies. The complexities of the law and stiff penalties for noncompliance require careful crafting of any policy.

Statutory Mandated Accrual Method

The first option available to employers is the statutory accrual method. Under the statutory accrual method, an employee earns one hour of sick pay for every 30 hours worked.[2]

Important points regarding accrual under the Act:

- Both regular and overtime hours are counted toward the accrual rate of one hour for every 30 hours worked.
- Employees can begin accruing as soon as they meet the eligibility requirement.
- Employees exempt under the administrative, executive or professional exemption are deemed to work 40 hours per workweek, but if the normal workweek is less than 40 hours then accrual will be based on their normal workweek.[3]
- Any accrued but unused time must carry over to the following year of employment. However, an employer can cap the employee's total accrued amount at 48 hours or six days. For more information, see "Cap On Accrual" on page 540.
- Employers can also limit the amount of leave an employee can take in any one year. For more information, "Parameters of Paid Sick Leave Use" on page 543.

Optional Accrual Method That Provides no Less Than 24 Hours by the 120th Day

New 2016

Some employers may not want to use the statutory accrual rate because, for example, their company tracks sick leave by pay period instead of hours worked. If this is the case, amendments to the Act provide some flexibility to use a different accrual method as long as the chosen method meets certain specific requirements.[4]

An employer may use a different accrual method, other than providing one hour per every 30 hours worked, provided that the accrual is on a regular basis so that an employee has no less than 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment, or each calendar year, or in each 12-month period.

If you decide to choose this option, make certain that the accrual method that your company uses meets the 120th day requirement.

Again, employers also have the option to cap the employee's total accrued amount at 48 hours or six days and/or to limit the amount of leave an employee can take in any one year.

Alternative Accrual Method for New Hires

A third option is available under the statute.

New 2016

Labor Code section 246(b)(4) states "an employer may satisfy the accrual requirements ... by providing not less than 24 hours or three days of PSL that is available to the employee to use by the completion of his or her 120th calendar day of employment."

The exact intent of this language is unclear given the second option described above. However, it appears that this option would allow an employer to use any sick leave accrual rate that would result in an initial hire having three days or 24 hours available to use on the 120th calendar day of employment. This option applies to only PSL; not to PTO.

Again, employers also have the option to cap the employee's total accrued amount at 48 hours or six days and/or to limit the amount of leave an employee can take in any one year.

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2. Lab. Code sec. 246(b)(1)
3. Lab. Code sec. 246(b)(2)
4. Lab. Code sec. 246(b)(3)

Pre-Existing Employer Policy (Policy in Effect Prior to January 1, 2015)

This is the fourth option available to employers.

If your organization already had a policy that provided PSL or PTO to a class of employees **before January 1, 2015,** you can continue using your pre-existing accrual method instead of the statutory accrual method of one hour per 30 hours worked, as long as the accrual method meets certain requirements.

This amendment to the Act recognizes that many employers already had generous paid sick or PTO policies in effect before January 1, 2015, that used an accrual method different than providing one hour per 30 hours worked. The amendment allows these pre-existing accrual methods to be grandfathered in so long as certain conditions are met.[5]

Accrual under the pre-existing policy must be on a regular basis and meet both of the following requirements:

- An employee has no less than one day or eight hours of accrued sick leave within three months of employment, each calendar year, or each 12-month period; and
- The employee was eligible to earn at least three days or 24 hours of sick leave or paid time off within nine months of employment.

If an employer modifies the accrual method used in the policy it had in place prior to January 1, 2015, the accrual method is no longer grandfathered in under the Act and must now comply with either:

- The statutory accrual method;
- The optional accrual method that provides no less than 24 hours by the 120th day;
- The alternative accrual method for new hires only; or
- The lump-sum approach discussed below.

An employer can, however, always increase the accrual amount or rate.

This fourth option can also apply to employees hired after January 1, 2015, so long as you had a pre-existing policy that applied to the class the new employee is hired into and that meets the above requirements.

If you choose this option, make certain that the accrual method that your company uses meets both the three-month **and** the nine-month requirements.

Again, employers will want to look at the cap on accrual and limits on use options. See "Cap On Accrual" on page 540 and "Parameters of Paid Sick Leave Use" on page 543 for more information.

Lump-Sum Method

The final option available to employers allows the employer to avoid the accrual and carryover provisions by having a policy that uses a "lump-sum method." Here, the employer grants the full amount of leave (three days or 24 hours) at the beginning of each year of employment, calendar year, or 12-month period.[6]

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[5] Lab. Code sec. 246(e)(2)

[6] Lab. Code sec. 246(d)

The lump-sum method allows an employer to avoid tracking accrual and carryover, and is less administratively burdensome.

In this lump-sum situation, an employee will not be able to carry over unused sick days, but will get three new sick days at the beginning of the following year.

The following specific requirements must be satisfied:

- The paid sick days must be offered at the beginning of each year of employment, calendar year, or 12-month period. For example, if you provided three days/24 hours on July 1, 2015, you would need to provide another three days/24 hours on July 1, 2016.
- The employee must receive a minimum of 24 hours or three days.
- The employer must put all the PSL into the employee's leave bank at once.
- The employer's lump sum policy must allow employees to use the leave for all of the same purposes and conditions specified under the Act. For more information see "Permissible Usage" on page 542 and "Parameters of Paid Sick Leave Use" on page 543.

A straight statutory accrual method with no cap could provide more accrued leave for the worker than a "lump-sum" approach — nearly nine days for a full-time employee.

Employers can use the lump-sum approach to avoid accrual and carryover issues and for ease of administration.

Another option for employers is to offer a lump sum of three days or 24 hours of PSL that can be used for all of the purposes under the Act and then offer additional employer provided sick days that are outside of the scope and requirements of the Act. The lump-sum days would count as protected PSL under the Act and have to meet all the legal requirements of the Act. The optional employer provided sick days would not.

For more information, see "Optional Additional Paid Sick Leave" on page 550.

Cap On Accrual

Unless an employer uses the lump-sum approach, any accrued but unused time must carry over to the following year of employment. However, the amount of PSL carried over to the next year can be **capped at 48 hours or six days**.

If an employer chooses any one of the accrual options, the employer should consider whether it wants to institute a cap on the maximum accrual.

If an employer does not cap the accrual by policy, a full-time employee (40 hours a week with no overtime) could potentially accrue more than 69 hours of PSL per year under the statutory accrual method, and be allowed to carry that over to the next year. This is nearly nine days per year if the employee works a 40-hour workweek:

> **Example:** 40 hours a week x 52 weeks in a year = 2,080 hours worked per year. Accrue one hour for every 30 hours: 2,080 hours ÷ 30 = 69.33 hours accrued per year. 69.33 hours ÷ 8 hours worked per day = 8.67 days per year.

In addition to any cap, an employer can also limit the amount of leave an employee can take. For more information, see "Parameters of Paid Sick Leave Use" on page 543.

The cap cannot be less than 48 hours or six days. You can always provide a more generous cap, such as allowing employees to accrue up to 80 hours or 10 days.

Non-Traditional Work Schedules and Providing '24 Hours or Three Days'

16 The Labor Commissioner's office issued an opinion letter regarding California's PSL law.[7] The opinion letter answers questions relating to how an employer provides "24 hours or three days" of PSL when you have employees that don't work a traditional eight hour day schedule. How does the law work, for instance, if you have workers with an alternative workweek schedule of four 10 hour days or part-time employees who work six hour shifts?

The essence of the opinion: Whichever application of the law provides the most benefit to the employee is the one which should be applied.

Here are some specific examples that the Labor Commissioner addressed:

> **Question 1:** Company A uses the lump-sum approach under Labor Code section 246(d) (full amount of leave front-loaded at the beginning of each year; no accrual or carry-over). Company A has employees that work regular 10 hour shifts. Does Company A provide these employees with a lump-sum of 30 hours of leave (three days at 10 hours per day) or only with 24 hours of leave on the theory that a "day" is limited to a maximum of eight hours?
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> **Answer 1:** If an employee's regular work hours are 10 hours per day, a paid sick day for that employee would be his/her normal full day of work — which in this instance is 10 hours. According to the Labor Commissioner, "[t]he 'full amount' of leave for this employee would need to be front loaded at the beginning of the year, meaning that three 10 hour days (which, if translated into hours would be 30 hours) must be front loaded at the beginning of the year." Any other interpretation would mean that Company A's employees with 10 hour workdays would receive less than the minimum of three days of PSL required by law, said the Labor Commissioner.
>
> **Question 2:** Company B uses the lump-sum approach. Company B has employees that work regular six hour days. What is the amount of time that must be provided as a lump-sum for these employees at the beginning of the year?
>
> **Answer 2:** The Labor Commissioner states that "the 'full amount of leave' the employer would need to front load for these employees would be a minimum of 24 hours (not three six-hour days)." If Company B only front-loaded three six hour days (i.e., 18 hours) it would "undercut the mandatory minimum standard of 24 hours for these employees."
>
> **Question 3:** Company C uses the accrual method. However, Company C limits the amount of PSL an employee can actually use in any given year to 24 hours or three days a year (under Labor Code section 246(d)). How does that limitation apply to employees working regular 10 hour shifts?
>
> **Answer 3:** If Company C's employee has accrued 30 hours or more of PSL in his/her leave bank and has a regular work hours of 10 hours per day, "the employee must be able to use and be paid for the full three days at 10 hours per day." Company C cannot limit the employee's use to 24 hours. Doing so would "undercut the Legislature's intent that employees be entitled to take a minimum of three days of PSL, without losing any compensation they would normally earn during their regular working hours."

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[7] DLSE Opinion Letter No. 2015.08.07

> **Question 4:** Company D also uses the accrual method and limits use of PSL to 24 hours or 3 days per year. How does Company D's limitation apply to part-time employees working regular 6 hour shifts?
>
> **Answer 4:** If Company D's part-time employee has accrued 24 or more hours of PSL in his/her leave bank and has a regular work schedule of six hours a day, Company D cannot "limit the employee's use of accrued PSL to only three days." In other words, Company D cannot limit the use of PSL to three six hour days or 18 hours, but must allow the employee to use 24 hours.

In the opinion letter, the Labor Commissioner emphasized the Legislature's intent that each class of employees should be treated fairly. "To limit a part-time worker who works four hour days to only 12 hours of PSL, based on a 'three day' standard, disregards the statutory reference to a minimum of 24 hours and would defeat the legislative objective of providing low wage workers with at least a minimum of 24 hours of PSL per year," said the Labor Commissioner's office.

While the Labor Commissioner's opinions are not legally binding, they provide valuable guidance as to how the Labor Commissioner will enforce the law. Failure to follow the guidance can result in administrative citations. If you have any questions on these issues, consult legal counsel.

Permissible Usage

An employee can use PSL for the diagnosis, care, or treatment of an existing health condition, or preventive care, for themselves or a "family member."[8] For example, an employee could take PSL for a cold or other sickness, for a sick child, or for an annual physical or other preventive care, like a flu shot.

Under the Act, family member has a broader definition than that found in the Family and Medical Leave Act/California Family Rights Act (FMLA/CFRA). For more information, see "FMLA and CFRA Qualifying Reasons" in Chapter 18, page 472.

A family member under the Act is a:

- Child
  - Child is defined as a "biological, adopted, or foster child, stepchild, legal ward, or a child to whom the employee stands *in loco parentis*." The definition of child applies regardless of the child's age or dependency status.
- Parent (or parent-in-law)
  - Parent is defined as a "biological, adoptive or foster parent, stepparent, or legal guardian of an employee or the employee's spouse or registered domestic partner, or a person who stood *in loco parentis* when the employee was a minor child."
- Spouse or registered domestic partner
- Grandparent (FMLA/CFRA laws)
- Grandchild (FMLA/CFRA laws)
- Sibling (FMLA/CFRA laws)

PSL may also be used for an employee who is a victim of domestic violence, sexual assault or stalking. For more information, see "Domestic Violence, Sexual Assault and Stalking Victims' Leave" in Chapter 22, page 581.

[illegible]

An employee can use the full amount of the paid sick days for a qualifying family member.

Because the definition of family member is broader than that under FMLA/CFRA, if, for example, an employee used three days of PSL under the Act to care for a grandchild, those particular three days could not be charged against an employee's FMLA/CFRA entitlements because those leaves only cover children, parents, spouses and (CFRA only) registered domestic partners — not grandchildren.

Employers must ensure that they are correctly tracking when time is used for eligible reasons under the PSL mandate. Employers will also need to track whether any other leave law may be implicated, such as family and medical leave.

Parameters of Paid Sick Leave Use

There are important points regarding how PSL can be used:

- Employees cannot start using accrued sick days until the **90th day** of employment; after that the employee can use sick days as accrued.
- Employers can **limit the amount of PSL an employee can use to three days or 24 hours per year**. This limitation applies even when an employee, under the default accrual method, could have accrued six days or 48 hours of PSL (or even more if the employer did not put a cap on accrual).
- PSL must be provided upon an employee's oral or written request. If the need for PSL is foreseeable, an employee must provide "reasonable" advance notice. If not, the employee must provide notice "as soon as practicable."

New 2016

The Act does not say whether you can require the employee to provide medical certification of the need for PSL (i.e., a doctor's note). The law simply says that the employee must provide reasonable advance notification. The Labor Commissioner has stated that denying leave because an employee failed to provide a doctor's note or other details about the leave may lead to a claim against the employer for violation of the Act. Unless the certification is required pursuant to another leave law, there is no provision in the Act allowing an employer to require certification for PSL.

Employers will need to adjust absence control policies that require a doctor's note when employees are absent for a set number of days. Moreover, policies that discipline employees based on a specific number of absences should not count days off that are protected by this law (or any other protected leave of absence).

- An employee may determine when and how much PSL he/she needs to use. For example, the employee can decide if he/she wants to take a full day or part of a day. You cannot tell an employee that he/she needs to take a half-day off for a brief morning doctor's appointment. An employer, however, can set a "reasonable minimum increment" of time that must be taken not to exceed two hours. In other words, you can require the employee to take a minimum of two hours of PSL at a time.
- An employer cannot require an employee to find a replacement worker for the time off.
- An employer can lend paid sick days to employees in advance of accrual. According to the law this is "at the employer's discretion, and with proper documentation." It is unclear what "proper documentation" means under this provision of the law.

Paying the Employee for the Sick Day

Employers can choose from three different methods to calculate how to compensate employees who take PSL. No matter which method employers choose, they must pay employees no later than the payday for the next regular payroll period after the sick leave was taken.[9]

New 2016

Employers can use any one of the following three methods:

- Calculate paid sick time for nonexempt employees in the same manner as the "regular rate of pay" for the workweek in which the employee uses paid sick time, regardless of whether the employee actually works overtime in that workweek;
- Calculate paid sick time for nonexempt employees by "dividing the employees total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment"; or
- Calculate paid sick time for exempt employees in the same manner as wages are calculated for other forms of paid leave time.

For information on how the "regular rate of pay" is traditionally defined, see "Regular Rate of Pay Defined" in Chapter 13, page 345.

Employee Leaves Employment and Reinstatement

Unlike unused, accrued vacation — which is treated like wages — sick leave under this Act does not need to be paid out at the end of employment (i.e., no "cash-out" of PSL at termination, resignation, retirement, or other separation from employment).[10]

Sick leave, including mandatory PSL, is not considered a form of wages.

If you combine mandatory PSL and vacation into a paid time off (PTO) policy, you will have to follow the rules relating to vacation and PTO, including paying out accrued but unused PTO, upon termination. For more information, see "Paid Time Off" on page 564.

Unlike other leave laws, previously accrued and unused paid sick days must be reinstated if an employee leaves employment and then is rehired within one year. Upon rehire, the employee must be allowed to use those previously accrued sick days and to begin accruing additional paid sick days.[11]

New 2016

An employer is not required to reinstate accrued paid time off to an employee who was paid out at the time of termination, resignation or separation of employment.[12]

Posting, Notices and Recordkeeping

The mandatory PSL law contains posting, notice and recordkeeping requirements. Employers will need to pay close attention to these obligations.

Poster

Employers must post a required PSL poster, created by the Labor Commissioner:[13]

- The poster advises employees of sick leave rights.
- The poster needs to be posted in a conspicuous location.
- Willful failure to post can result in a penalty of one hundred dollars ($100) for each offense.
- The requirement to put up the poster took effect on January 1, 2015.

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[9] Lab. Code sec. 246(k).
[10] Lab Code sec. 246(f)(1)
[11] Lab. Code sec. 246(f)(2)
[12] *Id.*
[13] Lab. Code sec. 247

CalChamber's ***2016 California and Federal Employment Notices Poster*** contains the PSL poster prepared by the California Labor Commissioner. Purchase at the CalChamber store at store.calchamber.com.

Notice to Employees

Employers also need to provide written notice of PSL information to all new hires and existing employees. The *Wage and Employment Notice to Employees (Labor Code section 2810.5)*, which employers have been required to provide since 2012, was updated by the Labor Commissioner to contain information about an employee's right to accrue and use PSL and about employee protections under the mandate.

Labor Code section 2810.5 applies only to nonexempt employees. The Labor Commissioner has stated, however, that employers are encouraged to ensure that all employees are aware of the employer's PSL policy.

This notice is sometimes referred to as the "wage theft" notice. For more information, see "Providing Wage Information Upon Hire" in Chapter 3, page 41.

Wage and Employment Notice to Employees (Labor Code section 2810.5)

Wage and Employment Notice to Employees (Labor Code section 2810.5)- Spanish

The form also contains a checkbox to inform the employee if the employer has an existing PSL or PTO policy that meets or exceeds the requirements of the PSL law.

New Employees

For any new employees hired after January 1, 2015, you should provide them with the updated version of the *Wage and Employment Notice to Employees (Labor Code section 2810.5)* at the time of hire.

Existing Employees

You also have to provide information about the PSL law to employees hired before January 1, 2015.

The reason you have to do this is because under state law, when information in the wage theft notice changes, existing employees must receive a new notice within seven days of any change. Therefore, you must individually notify employees who were hired before January 1, 2015, of the changes that relate to PSL.

If you change your PSL policy in the future, issue a new notice to your employees.

You can use a couple of methods to meet the requirement to provide notice of changes relating to PSL to existing employees:

- You can use the *Wage and Employment Notice to Employees (Labor Code section 2810.5)* provided by the Labor Commissioner and available on HRCalifornia at www.hrcalifornia.com.
- You can use a separate written document that contains all of the required information about PSL.
- You can reflect all changes on an itemized wage statement that's issued in a timely manner.

If you use a written document other than the notice created by the Labor Commissioner, you must make certain that the document summarizes your existing policy and demonstrates how you intend to meet the requirements of the PSL law for the particular employee. A best practice, according to the Labor Commissioner, is to include the specific points of information that are contained in the wage notice form.

The document must contain the following points of information about PSL specified in Labor Code section 2810.5. The document must state that an employee:

- May accrue and use sick leave;
- Has a right to request and use accrued PSL;
- May not be terminated or retaliated against for using or requesting the use of PSL; and
- Has the right to file a complaint against an employer who retaliates.

If you use a written document other than the notice provided by the Labor Commissioner, have that document reviewed by your attorney.

Payday Notice

There is also a required payday notice.[14] You must provide an employee with a written notice setting forth the amount of PSL available to the employee each pay period. You can provide this notice to the employee either:

- On the already required itemized wage statement; or
- In a separate writing provided to the employee with the payment of wages.

Employers will want to take a look at their itemized wage statements and update (for more information, see "Itemized Wage Statement" in Chapter 11, page 285). If you instead choose to develop and provide a separate notice with payment of wages, you may want to consult an attorney to make sure it meets the legal requirements.

Employers with unlimited PSL or paid time off policies can meet the payday notice requirement by indicating "unlimited" on either the itemized wage statement or the separate notice. With this type of policy, employees are not given a set number of days off but, instead, there is basically an honor system where employees can take time off whenever, and as often as, they like.

For more information, see "Unlimited Vacation Policies" on page 560.

New 2016

Employers in the broadcasting and motion picture industry covered by Wage Order 11 or 12 do not have to comply with the payday notice requirement until January 21, 2016.

Recordkeeping

In terms of recordkeeping, you will need to keep records for at least three years that document the:

- Number of hours that the employee worked
- Paid sick days accrued
- Paid sick days used by an employee

If an employer does not keep adequate records, there is a presumption that the employee is entitled to the maximum number of hours accruable unless the employer can show otherwise by clear and convincing evidence.

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[14] Lab. Code sec. 246

The records must be available for inspection by the Labor Commissioner. The records must also be available for inspection by the employee upon reasonable request, as with other payroll records. For more information, see "Access to Payroll Files" in Chapter 8, page 146.

You will need to update payroll and recordkeeping systems to ensure that you properly, calculate, track, and record the paid sick time. You will also want to make sure that you have met all of the notice requirements.

The following chart discusses tracking obligations:

	Track Sick Time Used (Labor Code 247.5)	**Track Accrual of Sick Days (Labor Code 247.5)**	**Pay Stub Notice (Labor Code 246(h))**
Sick Leave: Statutory Accrual	Yes	Yes	Yes: Amount of PSL available
Sick Leave: Lump Sum Policy	Yes	No	Yes: Amount of PSL available
Paid Time Off Policy	*No	*No	Yes: Amount of paid time off available

*The amendments to the Act state that an employer is not obligated to inquire into or record the purposes for which an employee uses paid time off.[15] However, if you have a PTO policy, it may be a best practice to track when employees use PTO for a reason that qualifies for protection under the PSL law. This is especially true if you have an attendance discipline policy — to ensure that you do not discipline employees for taking protected leave.

Protections Under the Law

The PSL Act contains strong protections for employees.[16] The Act forbids employers from:

- Denying employees the right to use accrued paid sick days.
- Taking any action against an employee for using accrued sick days or attempting to exercise the right to use accrued sick days. Prohibited actions include discharge, threat of discharge, demotion, suspension or any manner of discrimination.
- Retaliating against employees who file complaints alleging violations of the Act, or who cooperate in an investigation or prosecution of an alleged violation or oppose any policy, practice or act prohibited by this law.

Employers will be faced with a "rebuttable presumption" of unlawful retaliation if an employer takes adverse action (including denying the right to use accrued sick days) against a person within 30 days of when the employee:

- Files a complaint with the Labor Commissioner or alleges a violation of this law.
- Cooperates with an investigation or prosecution of an alleged violation of this law.
- Opposes a policy, practice, or act that is prohibited by this law.

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[15] Lab. Code sec. 247.5(b)

[16] Lab. Code secs. 245-249

What is a "rebuttable presumption?" It means that the Labor Commissioner or a court will assume that the employer violated the law unless the employer can come up with evidence to prove otherwise. If the employer does not provide any contrary evidence, it will be found to have violated the law.

These protections took effect January 1, 2015, even though the benefit did not take effect until July 1, 2015. Employers should not discriminate or retaliate against employees who ask about the PSL law or assert their rights to use PSL.

Penalties for Non-Compliance

The Healthy Workplaces, Healthy Families Act contains various stiff fines and penalties for not providing sick days — ranging from $50 to $4,000 aggregate — and allows for a civil action by the state. The Labor Commissioner is charged with enforcement.

In addition to administrative penalties, the Labor Commissioner can also order reinstatement, backpay, and the payment of sick days unlawfully withheld.

Some of the penalties include:

- **Unlawful withholding of sick days:** The greater of the dollar amount of paid sick days withheld multiplied by three, or $250 per employee.
- **Violation results in harm to the employee or person:** Administrative penalty of $50 per day "or portion thereof that the violation occurred or continued." This penalty would apply in instances of discharge, for example.

There is a $4,000 aggregate cap on these two penalties. These penalties are paid to the employee or other person whose rights were violated.

- **Failure to promptly comply:** The Labor Commissioner has discretion to take appropriate action, including filing a civil action, and may assess a penalty of $50 per day, per employee or other person whose rights were violated. This penalty is paid to the state. There is no cap on this penalty. The stated purpose is to reimburse the state for the costs of investigating and remedying the violation.
- **Civil action:** Brought by the Attorney General or the Labor Commissioner on behalf of the public, and includes reasonable attorney's fees and costs. The law does not expressly permit employees to bring a private civil lawsuit against employers for violation of the statute.
- **Failure to post the poster:** $100 civil penalty per offense.

Isolated, unintentional payroll errors or notice errors that are clerical or inadvertent mistakes regarding accrual and use of PSL will not be considered violations of the PSL mandate.

Importantly, the determination as to whether an employer has committed a violation may include an examination of whether the employer has compliant policies and practices in place.

Employers will want to review their policies and practices to ensure compliance. Employers may want to consider including a reporting/complaint mechanism. For example, if an employee is denied PSL by his/her supervisor, you could institute a process where the employee can go to HR and ask for a second "check" on whether he/she can take sick leave.

Mandatory Paid Sick Leave in Other Jurisdictions

There are multiple jurisdictions that also provide mandatory PSL benefits — on both the local and the national level.

The Healthy Workplaces, Healthy Families Act expressly states that the law that provides more generous rights or protections to the employee will apply. The Act "establishes minimum requirements pertaining to paid sick days and does not preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement, policy, or standard that provides for greater accrual or use by employees of sick days, whether paid or unpaid, or that extends other protections to an employee." [17]

Consult with legal counsel to develop a plan for complying with PSL laws in other jurisdictions. Review laws where employees are located or travel for business. Remember that California's sick leave mandate is triggered when an employee spends 30 days working for the same employer in California.

San Francisco's PSL law has been on the books since 2007. San Francisco's law provides more generous benefits in some areas, but the Healthy Workplaces, Healthy Families Act is more generous in others. There are significant differences between the two laws which can provide compliance challenges.

For a comparison of state and local leave laws, view the *Comparison of California State and Local Paid Sick Leave Laws* chart, an excellent resource prepared by Fox Rothschild LLP.

Comparison of California State and Local Paid Sick Leave Laws

Other jurisdictions that have PSL laws include:

- The city of Emeryville has a PSL ordinance. It took effect July 1, 2015.
- The city of Long Beach has a PSL ordinance that applies to the hospitality industry, specifically hotels with more than 100 beds.
- The city of Oakland passed a PSL ordinance, which took effect March 2, 2015, with varying requirements depending on the size of a business.
- The city of Los Angeles enacted a paid time off law that applies to hotels with 150+ guest rooms in the city limits. The provisions exceed the requirements of the state law. The paid time off can be used for sick leave, family sick leave, vacation or personal time. The Los Angeles ordinance contains an additional unpaid time sick leave provision of up to 80 hours for full-time employees.
- The city of San Diego is considering a PSL ordinance, and other local jurisdictions may follow suit.
- The state of Connecticut has PSL — the first state with a mandate. Massachusetts recently voted for PSL — becoming the third state to require it.
- There are other cities outside of California with PSL, including a number of cities in New Jersey and Oregon; New York City; Portland; Philadelphia; Seattle; and the District of Columbia.
- An executive order was issued in September 2015 which would mandate up to seven days of PSL a year for the employees of federal contractors and subcontractors. The Department of Labor must issue regulations first and, if finalized, this PSL mandate will not be effective until 2017.

Local Minimum Wage and Paid Sick Leave Ordinances

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[17] Lab. Code 249(d)

Optional Additional Paid Sick Leave

Employers are free to provide more generous policies than what must be provided under the Healthy Workplaces, Healthy Families Act. As long as you meet the requirements of the mandatory law, you can provide additional time off to employees for use when ill or injured. For instance, some employers might choose to provide a lump sum of three days or 24 hours of mandatory PSL and then have a separate amount of employer provided sick leave or PTO.

You determine the amount of additional sick days an employee can use. You should also consider kin care obligations. For more information, see "Kin Care" on page 551.

You are not required to pay out accrued sick leave at the time of termination. With PTO, on the other hand, all accrued and unused hours must be paid out at termination. If you combine sick leave and vacation into a PTO plan, you will be required to pay out when the employee leaves. For more information, see "Paid Time Off" in Chapter 21, page 564.

If you have any requirements to take PSL before taking unpaid leave, be sure to list all types of absences this policy covers.

Track sick leave to make sure you are not paying employees for time off that they do not have available.

Although there is no requirement to continue to pay employees who have exhausted accrued PSL or PTO, employers may have continuing obligations under other leave laws or an obligation to reasonably accommodate the employee under the Americans with Disabilities Act (ADA).

Coordinating Paid Leave

Mandatory sick leave taken under the Act is paid for by the employer. An employee will generally not need to access wage replacement benefits during these paid days off, such as SDI or PFL benefits.

There may be situations where paid sick days are used to supplement the SDI or PFL benefits and provide whole compensation, as long as you have a policy in place. SDI and PFL only partially subsidize an employee's regular rate of pay. However, the Employment Development Department (EDD) has not specifically addressed the interaction of the new PSL requirement with SDI and PFL. For more information, see Chapter 15, "State Disability Insurance (SDI) and Paid Family Leave (PFL)."

In the past, if an employee was on a FMLA leave of absence and did not receive any type of state wage replacement benefit, you could generally require the employee to use employer-provided paid leave (such as sick, vacation or PTO) to cover the unpaid FMLA leave. For more information, see "Pay and Benefits During Family and Medical Leave" in Chapter 18, page 495.

Logically, this would apply also to paid sick days under the Healthy Workplaces, Healthy Families Act; in other words, you could require the employee to use his/her accrued paid sick days under the Act to cover some of the unpaid FMLA leave taken. PSL would run concurrently with FMLA leave.

However, this answer is not entirely clear as the Act does not specifically address this point.

The interaction of the new PSL mandate with other leave and benefit laws is uncharted territory and not specifically addressed by the Act.

Note that you cannot require an employee to use accrued paid leave during FMLA leave if the employee is receiving SDI, workers' compensation insurance or other type of disability benefits

Kin Care

Under California's kin care law, you must allow employees to use one-half of their annual sick leave entitlement to care for a family member.

The kin care law does not require that the amount of days available for kin care carry over from year to year. You can limit the amount of kin care leave to one-half of that year's allotment of sick leave, regardless of what was or was not taken the year before.

Employers who deny employees kin care face financial penalties imposed by the state and civil lawsuits.

Originally, the mandatory PSL law covered more employees, and more reasons for leave, than the kin care law.

However, legislation effective January 1, 2016, made technical amendments to California's kin care law to conform to the mandatory PSL law. The law now allows employees to use kin care for the same purposes specified by the PSL law and defines "family member" under the kin care law the same as under PSL.[18]

Kin Care Coverage

Effective January 1, 2016, kin care time can be used when the employee is absent for any of the reasons covered under the PSL law. This includes time off for:

- Diagnosis, care, or treatment of an existing health condition, such as the flu;
- Preventive care, such as an annual physical or flu shot;
- Victims of domestic violence, sexual assault or stalking.

Kin care can be used for any of the individuals covered by the PSL law:

- A child: A biological, adopted or foster child, stepchild, legal ward, or a child to whom the employee stands *in loco parentis*. This definition of a child is applicable regardless of age or dependency status;
- A parent: A biological, adoptive, or foster parent stepparent, or legal guardian of an employee or the employee's spouse or registered domestic partner, or a person who stood *in loco parentis* when the employee was a minor;
- A spouse;
- A registered domestic partner;
- A grandparent;
- A grandchild;
- A sibling.

Since kin care can now be used for the same reasons and for the same family members as PSL, review the information in "Permissible Usage" on page 542.

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[18] Lab. Code sec. 233

Kin Care Interaction with Mandatory Paid Sick Leave

Kin care allows employees to use half of their accrued sick leave for specified purposes. But under the mandatory PSL law, an employee can use the *entire amount* of PSL accrued for care of a defined family member. An employer cannot limit employees to only using half of their protected PSL accrual to care for a family member — they can use all of it. For more information, see "Permissible Usage" on page 542.

Nevertheless, kin care may still apply in certain situations. To the extent an employer provides optional sick leave or PTO beyond what is required under the Healthy Workplaces, Healthy Families Act, the employer may be able to limit employees to only using half of that additional sick leave to care for family members as defined in the kin care law.

For example, an employer may choose to provide a lump sum amount of three days or 24 hours of mandatory protected PSL for its employees, and then offer an additional amount of employer provided PTO, the employer will need to comply with both PSL and kin care obligations. Under this scenario, the employer would need to allow employees to use the full amount of carved out protected sick leave (three days or 24 hours) for a family member (as defined under the PSL law) and half of the amount of any additional employer provided PTO for a family member under the kin care law.

Paid Time Off (PTO) and Kin Care

PTO combines vacation and sick leave into one benefit. According to the Labor Commissioner, if PTO does not specifically designate part of the time provided as vacation and/or sick, then the entire allotted time will be considered sick leave for kin care purposes. Half of the total PTO accrual will be subject to kin care. Again, review the interaction of this requirement with the mandatory PSL law.

Penalties for Denying Kin Care

You cannot deny an employee the right to use kin care. You also cannot terminate, threaten to terminate, demote, suspend or discriminate in any manner against an employee for using or attempting to use sick leave to attend to the illness of a child, parent, spouse or domestic partner. Violation can lead to an order of reinstatement and actual damages, or one day's pay, whichever is greater, and any other relief a court may award.

California placed kin care leave on the same footing as FMLA/CFRA: It is unlawful for employers to count days off taken for kin care purposes as days of absence that can result in discipline, demotion or discharge. An absenteeism control program that counts time off against an employee violates state law. An employee who suffers this action is entitled to the penalties provided by statute.[19]

Kin Care and Uncapped Sick Leave Policies

In *McCarther v. Pacific Telesis Group*, the employer offered an uncapped sick leave policy.

The collective bargaining agreement (CBA) allowed employees to be compensated for any day they missed work due to their own illness or injury for up to five consecutive days in any seven-day period. The employees had no cap to their sick leave, did not formally accrue sick leave and didn't have a bank of sick leave.

To prevent an employee from taking excessive sick days under the CBA, the CBA also specified an attendance management policy that subjected employees to progressive discipline if they had eight or more absences within a 12-month period with no extenuating circumstances (unless the absences were otherwise legally protected, perhaps by workers' compensation laws or the FMLA).

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[19] Lab. Code sec. 234

The California Supreme Court looked to the plain language of the Labor Code, which mandates that employers providing sick leave allow employees to use accrued and available sick leave in "an amount not less than the sick leave that would be accrued during six months at the employee's then current rate of entitlement" to care for an ill child, parent, spouse or domestic partner.

The state Supreme Court stated that the statute plainly limits the amount of sick leave that can be used for kin care purposes and that the "reach of the statute is limited to employers that provide measurable, banked amounts of sick leave." An uncapped sick leave policy makes it impossible to determine the amount of compensated sick time an employee could be entitled to within the six months specified by the statute, and the state Supreme Court ruled that the employer was not required to allow employees to use up to one-half of the annual sick leave benefit for kin care.[20]

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[20] *McCarther v. Pacific Telesis Group*, 48 Cal. 4th 104 (2010)

Chapter 21

Vacation, Paid Time Off and Holidays

Vacation and paid time off (PTO) are benefits that you can choose to offer your employees. Both are considered a form of wages that employees earn as they work. Under California's wage and hour laws, vacation and PTO must accrue and must be paid out at termination. The only exception is where the benefit is provided through an Employee Retirement Income Security Act (ERISA) qualified plan.

Because vacation and PTO are considered wages, accrued and unused time needs to be paid out at termination.

Vacation is typically used by employees to pay for time away from work for their own personal use and enjoyment.

PTO typically combines sick leave and vacation allowances into one block of time. The employee can use PTO for personal reasons, vacation or sick leave. For more information about sick leave, see Chapter 20, "Paid Sick Leave."

While there is no requirement that your employee handbook contain information about benefits such as vacation and paid time off, such policies are recommended. Moreover, a PTO policy that includes mandatory paid sick leave should be communicated to employees. You can include eligibility requirements, conditions for scheduling time off, any requirements for prior approval of vacation or paid time off, and other issues related to time-off benefits.

CalChamber's ***Employee Handbook Creator*** can help you easily create an employee handbook that contains these policies. Purchase at the CalChamber store at store.calchamber.com.

Vacation

If you choose to offer paid vacation to employees, you must follow California law concerning vacation benefits. Paid Time Off (PTO) is also governed by the same laws concerning vacation and is additionally impacted by the new paid sick leave benefit. For more information, see "Paid Time Off" on page 564.

Vacation Defined

A vacation is any paid time off earned as a benefit. Any "personal holiday" (sometimes referred to as a "floating holiday") that is not associated with any specific event, such as a birthday or holiday, is treated as vacation.

You can choose not to offer paid vacation time as a benefit. If you do provide paid vacation time, you have the right to set how much paid vacation time that employees can earn each year.[1] You also have the right to determine when employees may or may not take vacations and the length of the vacations.

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[1] DLSE *Enforcement Policies and Interpretations Manual* sec. 15.1.2

Vacation Is a Form of Wages

Paid vacation leave constitutes a form of wages.[2] PTO is also a form of wages (see "Paid Time Off" on page 564). The right to vacation vests as the employee renders services, so employees earn a portion of the annual vacation each day.[3] If employees receive two weeks of vacation per year (80 hours), vacation accrues at a rate of approximately 0.30 hours daily. If employees receive one week of vacation per year (40 hours), vacation accrues at a rate of approximately 0.15 hours daily.

If vacation is offered as a benefit, the law does not require that the accrual begin the first day of employment. An employer may set a waiting period before vacation accrual actually starts. The employer is free to determine when an employee becomes eligible for vacation benefits so long as eligibility and vesting occur simultaneously. Thus, a "waiting period" for vacation benefits to accrue and vest is permissible.[4]

Vacation Policy Considered a Contract

Because paid vacation leave is a form of wages earned by an employee, paid vacation is also part of the "employment contract" between you and the employee. As part of that contract, the employee performs specific duties in exchange for compensation, which, in this situation, includes both regular wages and vacation time earned.

Due to a contract being created, it is critical that you clearly state your vacation policy. The policy should include how much vacation you offer and the rate at which vacation days are earned. The policy should also state whether an employee earns vacation days beginning on the first day of employment or after some period of time has passed.[5]

You can create a policy under which employees do not begin earning vacation immediately upon hire.[6]

You can adopt a policy that specifies the amount of vacation pay an employee is entitled to accrue, based on length of service. When an employee starts his/her employment, notify the employee when vacation accrual begins, the amount to be accrued, any caps on accrual or restrictions on the use of vacation.

Advance Notice of Vacation During Plant Shutdown Required

You can require that employees take vacation at a specific time of the year. Similarly, you can prohibit the use of vacation at a specific time of the year.

It is recommended that you provide as much advance notice as possible if you require the use of, or prohibit the use of, vacation at a specific time.

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[2] *People v. Bishopp*, 56 Cal. App. 3d Supp. 8, 11 (1976); *In re Wil-Low Cafeterias*, 111 F.2d 429, 432 (2nd Cir. 1940); *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 777, 781 (1982)

[3] *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 777, 782-784 (1982)

[4] *Owens v. Macy's Inc.*, 175 Cal App. 4th 462

[5] *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 777, 781 (1982); Lab. Code sec. 227.3; *Boothby v. Atlas Mechanical*, 6 Cal. App. 4th 1595, 1601 (1992)

[6] DLSE *Enforcement Policies and Interpretations Manual* sec. 15.1.3

No Use it or Lose it Policies Allowed

After an employee earns vacation, you cannot take it away. California courts and the Labor Code prohibit a "use it or lose it" policy, in which employees lose earned vacation if it is not taken by a specific time.[7] You cannot require employees to forfeit accrued vacation for any reason. You may place a reasonable cap on vacation.

There is one exception: If a collective bargaining agreement forms the basis for employees' earned vacation time, the Labor Commissioner will allow use it or lose it provisions.[8] If you eventually pay the vacation time, the Labor Commissioner may impose waiting time penalties on late payment.[9]

Reasonable Cap on Accrual Allowed

Under a reasonable cap plan, after an employee accrues a certain level of vacation, but does not take the time, vacation no longer accrues until the employee takes some of the previously accrued time.[10] After the employee takes some vacation, he/she begins to accrue time at the usual rate. You are not required to retroactively grant the employee the amount he/she would have earned during the time the vacation was at the cap.

The cap should be reasonable, based on factors such as:

- The amount of vacation offered
- The opportunity for employees to take vacation during the year
- The type of business or industry involved

Many employers impose caps at 1.5 or 2 times the annual accrual rate, for example, 60 or 80 hours for an employer granting 40 hours of vacation per year. An employee must have a reasonable amount of time after the accrual to take the time before a cap is imposed.

Examples of How Caps Work

The following situations are examples of vacation policies with caps. A low cap is not valid unless the employee is free to use vacation as it is earned.

Examples include:

- XYZ company offers 40 hours of vacation per year. There is a 60-hour cap on vacation accrual. Eddie started working for the company on January 1, 2015. He began accruing vacation immediately. He did not take any vacation in 2015. Eddie accrued 40 hours of vacation in 2015.

  Eddie continued accruing vacation in 2016 until June 30, when he hit the 60-hour cap. He did not accrue any vacation in July, August or September. He finally took a week off from October 1 through October 7 in 2016. He did not begin accruing vacation again until October 1, 2016, when he began his first vacation.

  XYZ was not required to retroactively give Eddie the vacation he otherwise would have earned in July, August and September. Eddie lost the opportunity to earn vacation during those months because he already reached the cap. However, at no time did the company violate the rule against use it or lose it policies.

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[7] *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 777, 782-784 (1982); Lab. Code sec. 227.3; *Boothby v. Atlas Mechanical*, 6 Cal. App. 4th 1595, 1601 (1992)

[8] Lab. Code sec. 227.3; *Livadas v. Bradshaw*, 512 U.S. 107, 114 S.Ct. 2068 (1994)

[9] DLSE *Enforcement Policies and Interpretations Manual* sec. 15.1.6

[10] DLSE *Enforcement Policies and Interpretations Manual* sec. 15.1.4

- ABC Company offers 40 hours of vacation per year. There is an 80-hour cap on vacation accrual. Wilma started working for the company on January 1, 2014. She began accruing vacation immediately. Wilma was ineligible to take any vacation in 2014, because she had not completed a year of service. Wilma accrued 40 hours of vacation in 2014 and continued accruing vacation in 2015, never reaching the 80-hour cap.

  She took a week off from October 1 through October 7, 2015, reducing her vacation bank to 40 hours. Wilma continued earning vacation in 2016 until she reached the 80-hour cap.

Cash-Out Policies Allowed

You can choose to offer your employees the option to cash out their vacation benefits. You can offer this option on an as needed basis or allow it only once a month or once a year. You can require employees to accept pay each year for vacation time that they accrued but did not take, instead of carrying vacation time over from one year to the next. The cash out of vacation time must be at the employee's current pay rate.[11]

Vacation Can Be Taken Before it Is Earned

Because of schedules and employee needs, you may allow employees to take vacation before they actually accrue it. Because the time is a form of wages, this practice is, in effect, a loan against future wages. If employment terminates before the vacation is earned, you will not be able to recover the advanced vacation wages. For more information, see "Employee Debts, Loans and Deductions" in Chapter 11, page 273.

To avoid issues of recovering an advance, you can create a policy that prohibits employees from taking vacation before they have earned or accrued it.

Requiring Advance Notice of Vacation

Company policy can require employees to give notice before taking vacation days. If an employee fails to report to work and then declares the missed day as a vacation day, you need not pay the employee for the claimed day. You are entitled to discipline the employee for failure to report to work in accordance with your policies.

Be mindful as to whether the absence is a protected leave, such as FMLA/CFRA leave.

Pay of Accrued Vacation at Termination

Because accrued vacation is considered wages, you must pay out all accrued but unused vacation when the employment relationship ends.[12] You must pay out even for an employee who had accrued vacation that he/she was not yet eligible to take. For example, employees may start to earn vacation immediately upon being hired, but be required to work for one year before using any vacation time.

Though you can base your vacation-earning policy on the week, pay period or some other time period, you must base computation of vested vacation benefits for a terminated employee on the employee's daily accrual or vesting, including the final day of work.

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[11] DLSE Opinion Letter 1994.03.08

[12] Lab. Code sec. 227.3; *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 777, 782-784 (1982)

You must pay out accrued but unused vacation at the employee's final rate of pay, regardless of the rate of pay at which it was earned.[13] An employee who earned 10 hours of vacation while making $9 per hour and who is then terminated or quits while making $10 per hour, will receive $100 in vacation wages with his/her final paycheck. Similarly, an employee who receives a cut in pay will receive his/her vacation pay at the lower rate at termination. The Labor Commissioner will probably not tolerate lowering of an employee's rate of pay just before termination to avoid paying a fair amount of earned vacation.

Four-Year Limit on Payment Invalid

The Division of Labor Standards Enforcement's *Enforcement Policies and Interpretations Manual* includes a statute of limitations on vacation pay due at termination. According to the DLSE, four years of accruals would be due when a written employment contract is terminated and two years of accruals would be due when an oral employment contract is terminated.

In *Church v. Jamison*, a California appeals court rejected the DLSE interpretation. It applied the literal wording of Labor Code section 227.3. Payment of all vested vacation is due to a terminating employee. The court ruled that the employee had a right to recover any unused vacation time and was not limited to only going back four years.[14]

Employee Retirement Income Security Act (ERISA) Exemption and Vacation Plans

If your vacation plan is covered by the Employee Retirement Income Security Act (ERISA), the federal law about employee pension and welfare plans, the Labor Commissioner will take employee claims relating to those plans.[15] Generally, ERISA covers a plan if the vacation pay does not come out of the employer's general assets. However, the Labor Commissioner will take an employee's claim to investigate if the vacation plan is, in fact, covered by ERISA.[16]

Partial Day Vacations for Exempt Employees

California employers often ask how they can handle partial-day absences for exempt employees without jeopardizing the employee's exempt status. Employers can't dock an exempt employee's salary when he/she is absent from work for only part of a day. But a California employer can replace salary on an exempt employee's partial day off by charging the time to the employee's vested vacation or PTO bank.

California courts authorize the practice of partial day deductions from leave banks, and California's Labor Commissioner also authorizes the practice.

Employers can replace salary by charging the time to the employee's vacation bank, provided the employee has enough time available when the absence occurs. It doesn't matter if the absence was for one hour, four hours or six hours; the time can be deducted from an available accrued leave bank.

Employers can't dock an exempt employee's salary for the partial day absence. If the employee doesn't have enough accrued time available when the absence occurs, he/she must be paid for a full day if he/she performs any work that day.

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[13] Lab. Code sec. 227.3

[14] *Church v. Jamison*, 143 Cal. App. 4th 1568 (2006)

[15] *California Hospital Assn. v. Henning*, (9th Cir. 1985) 770 F.2d 856, modified 783 F.2d 946, cert. den. 477 U.S. 904

[16] DLSE *Enforcement Policies and Interpretations Manual* sec. 15.1.7; *Millan v. Restaurant Enterprises Group, Inc.*, 14 Cal. App. 4th 477 (1993)

Deductions should always be made in accordance with an employer's policy. For more information, see "Limited Deductions From Salary" in Chapter 4, page 68.

Court Confirms Partial Day Deductions from Accrued Leave

A 2014 decision by a California Court of Appeal reaffirmed the practice of partial-day deductions from leave banks and also emphasized that the deduction can be made in any time increment, including increments of less than four hours, without jeopardizing the employee's exempt status.[17]

The case involved an exempt employee at General Atomics who accrued PTO. Company policy required exempt employees to use PTO hours when they were off work for full or partial days. At first, the policy required exempt employees to use PTO only for partial-day absences of four or more hours. Later, the policy was changed to allow partial-day absences of any length to be deducted from PTO balances.

Rhea challenged the only previous court case on this issue, *Conley v. Pacific Gas & Electric Co.*, which allowed employers to deduct time from exempt employees' vacation leave banks for partial-day absences. But, the facts in Conley addressed a policy that only required the use of vacation for absences of at least four hours.[18]

In an opinion letter issued after *Conley*, the DLSE stated that California employers may deduct from vacation and sick leave balances for exempt employees' partial-day absences of fewer than four hours without undermining the salary basis test for purposes of overtime exemption.[19] The DLSE approved the practice of allocating any amount of an exempt employee's partial-day absence to vacation, PTO or sick time.

This deduction, according to the DLSE, can be made without undermining the salary basis test for purposes of an overtime exemption.

Rhea argued that the *Conley* decision and the DLSE's adoption of the decision wrongly led to the forfeiture of wages since vacation in California is a type of wages earned by the employee.

The court disagreed with Rhea and stated clearly that California employers may require exempt employees to use their vacation or leave time when they are absent from work for a partial day: "[R]egardless of whether the absence is at least four hours or a shorter duration, a requirement that exempt employees use Annual Leave time for a partial-day absence does not violate California law."

The court found that there was no reason to distinguish between partial-day absences of varying lengths; an absence of any time increment can be deducted from an available leave bank.

Unlimited Vacation Policies

New 2016

Companies with unlimited paid vacation policies operate on an honor system where employees can take time off whenever, and as often, as they like. Time off is generally not tracked and there is no accrual. The focus is on the successful completion of tasks, instead of the specific amount of time spent on a task.

There are legal risks to unlimited vacation policies in California. These risks include the following:

- Vacation accrual: Companies with unlimited paid vacation plans argue that there is no accrual and, therefore, no vesting and no vacation pay out at termination. But the California Labor

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[17] *Rhea v. General Atomics*, 227 Cal.App.4th 1560 (2014)

[18] *Conley v. Pacific Gas & Electric Co.*, 131 Cal.App.4th 260 (2005)

[19] DLSE Opinion Letter 2009.11.23; DLSE *Enforcement Policies and Interpretations Manual* secs. 51.6.and 15.4

Commissioner and California courts may see this as a subterfuge to avoid paying out accrued vacation.

Courts may look to see what is actually going on in practice. For example, despite the company's stated policy is the unwritten practice really that employees are given two weeks of paid vacation? If so, it may need to be paid out just like under any other type of vacation plan.

- Unfair treatment: Unlimited paid vacation policies also may lead some employees to claim unfair or discriminatory treatment. Employees may argue that the policy is applied inconsistently. There may be problems of favoritism or, the opposite, arbitrary denials or crackdowns.

  If your company wants to institute an unlimited vacation policy only for your top-level exempt employees or for a certain department, you should look closely at the demographics of that particular subset of employees. Examine whether racial or gender differences exist that may be perceived as discriminatory.

- Coordination with other benefits: Unlimited paid vacation policies may conflict, or create coordination problems, with other paid and unpaid leave benefits, including mandatory paid sick leave, federal and state family and medical leave, pregnancy leave and military leave.

  For example, federal and state family and medical leave is unpaid, but employees can use any accrued vacation time during their leave of absence in order to receive paid time off. If there is an unlimited vacation policy, the employee could argue that he/she is entitled to pay for the entire 12 weeks.

There may also be other legal risks, as well as problems of abuse. Employers considering implementing unlimited vacation policies should consult legal counsel.

Sabbatical Versus Vacation

In *Paton v. Advanced Micro Devices, Inc.*, a California Court of Appeal evaluated the differences between paid sabbaticals and regular paid vacations. The distinction is important for California employers, who typically do not pay an employee for an unused sabbatical upon termination.[20]

Advanced Micro Devices (AMD) established a sabbatical program as an employee benefit. All full-time, salaried employees were eligible for an eight-week paid sabbatical after seven years of service. Employees had to demonstrate achievement of certain performance standards. The purpose of the sabbatical was "time away from work for enrichment and revitalization." Employees were not expected to pursue any work-related study or other activities during the sabbatical.

AMD's policy stated that the sabbatical benefit would forfeit upon termination of employment. The sabbatical program was in addition to AMD's regular vacation benefit.

Plaintiff Paton worked for AMD for approximately eight years. When Paton resigned, AMD refused to pay him for the unused eight-week sabbatical in his final paycheck. Paton filed a claim for nonpayment of wages.

Four Factors Create a Sabbatical

The court determined that vacation "is paid time off that accrues in proportion to the length of the employee's service, is not conditioned upon the occurrence of any event or condition, and usually does not impose conditions upon the employee's use of the time away from work." The court also noted that a vacation benefit is not an inducement to remain employed, in contrast with a bonus or stock options.

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[20] *Paton v. Advanced Micro Devices, Inc.*, 197 Cal.App.4th 1505 (2011)

The court then went on to identify four factors that will distinguish a sabbatical from a vacation:

- Sabbaticals are granted infrequently, such as after seven years of service, as an inducement to employees to keep their jobs.
- The duration of the sabbatical should be sufficient to achieve its purpose. When the sabbatical is "unconditional" — for the purpose of re-energizing the employee — the sabbatical should be longer than a normal vacation period.
- A sabbatical will always be longer than an employee's regular vacation entitlement. Additionally, the "regular vacation" period should be comparable to that offered in the industry, since employers could otherwise offer an extremely short "vacation" period as a counterpoint to a two-week sabbatical.
- Since a sabbatical is a benefit designed to retain employees, the employee taking a sabbatical should be expected to return to work at its conclusion.

The court concluded that there was insufficient evidence to demonstrate clearly whether AMD's eight-week absence was a sabbatical or a vacation. Employees at AMD could accrue up to eight weeks in vacation time, so the sabbatical was not for a significantly longer duration. Additionally, neither party presented evidence of common vacation accruals in AMD's industry. Consequently, the court referred the case back to the trial court to weigh the four specific factors in light of AMD's actual policy.

If you currently offer employees a sabbatical program, or are considering offering sabbaticals as an inducement to continued employment, consult with legal counsel to ensure compliance with the four factors set out by the *Paton* court.

For more information on sabbaticals, see "Sabbaticals" in Chapter 22, page 597.

Paying the Employee for Vacation

California law does not require employers to provide vacation. However, if you offer these benefits, you must follow specific rules:

- Vacation is considered wages. They must be earned and vested as the employee works. For example, if the accrual rate you set for vacation is two work weeks (ten days) per year, after six months the employee will have earned one work week (five days) of vacation.
- Vacation pay accrues as earned and cannot be forfeited even when the employment relationship ends, regardless of the reason.
- Although you can place a reasonable cap on vacation accrual, you must give employees a reasonable amount of time to use vacation before they stop accruing time.
- Accrued vacation is paid out at termination at the employee's final rate of pay, not at the rate in effect when the employee accrued the vacation.[21]
- You determine at what point the employee begins to earn vacation. For example, the employee cannot begin to earn vacation until after the first month, three months or six months of employment.
- The accrual rate cannot decelerate. You cannot designate an accrual rate of two weeks after six months of employment and two weeks after the following year. This plan creates a deceleration of accrual. The employee earns no vacation during the first six months, accrues vacation at the

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[21] Lab. Code sec. 227.3

rate of 1.66 days per month during the second six months of employment, then accrues 0.833 days per month during the second year.

If you fail to pay out accrued and unused vacation wages at termination, employees can file a wage and hour claim with the Labor Commissioner or in superior court. If the employee wins, he/she can collect a waiting penalty of one day's wage for every day that the wages were unpaid, up to 30 days. Additionally, at the time of termination the employee would have a claim for any unpaid vacation wages accrued during his/her employment.

Continuing Benefits During Vacation

You must continue benefits for an employee on vacation as you would if he/she were actively working. However, you decide if an employee continues to accrue vacation, PTO or sick leave while using vacation, PTO or sick leave.

Controlling Vacation

You generally pay an employee on vacation the same rate as you would for his/her regular duties. Employees can also use vacation with other forms of leave. The following sections illustrate the requirements California law creates for the use of vacation during other types of leaves.

Using Vacation During Pregnancy Disability Leave (PDL)

You cannot require an employee to use vacation during a pregnancy disability leave (PDL) absence. You must permit an employee to use vacation during PDL if she requests the benefit during her PDL. The employee makes the choice to use vacation.

However, the employee must meet any eligibility requirements set by your policy or practice before being able to use vacation during a PDL absence.

Using Vacation During FMLA or CFRA

You can require an employee to use vacation during some Family and Medical Leave Act (FMLA) or California Family Rights Act (CFRA) absences that are not related to pregnancy disability. Include these requirements in your employee handbook. For more information, see “Vacation, Paid Time Off (PTO) and Family and Medical Leave” in Chapter 18, page 496.

If the employee takes leave under the FMLA and the employee receives disability benefits, such as State Disability Insurance (SDI), workers' compensation benefits or other types of disability benefits, you cannot require the employee to use vacation benefits during the portion of leave where they are receiving these disability benefits.

Communicating Vacation Policies to Employees

If you do not plan to advance vacation time that has not yet been earned, notify the employee that he/she cannot take more vacation until it has accrued. You should regularly reconcile an employee's vacation accruals with time he/she has taken, and send written notice advising employees of the amount of accrued time remaining for vacation.

If you advance vacation, the vacation is not considered an employee debt. You cannot deduct the money from the employee's wages later, even if he/she has accrued enough time off to pay back the advance.[22]

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[22] DLSE *Enforcement Policies and Interpretations Manual* sec. 11.2.6

You must pay out any accrued, unused vacation at the time of termination.

Include the following information in your employee handbook or written policies:

- The time period during which accrual begins for new hires, the rate of accrual and any incremental increases in accrual, such as for more years of service.
- Any eligibility requirements or restrictions on the use of vacation and any required use, including during a leave of absence.
- Any requirements that vacation be requested in advance, in writing or be approved by a supervisor or other individual.
- The form or other documentation required to report vacation.

Vacation Policy Best Practices

- Create a clear vacation policy and provide employees with a copy of the policy
- Do not create unreasonable caps on how much vacation can be earned
- Do not institute a "use it or lose it" vacation policy
- These same rules will apply to PTO policies.

CalChamber's ***Employee Handbook Creator*** can help you easily create an employee handbook that contains this policy. Purchase at the CalChamber store at store.calchamber.com.

Paid Time Off

Some employers choose to combine vacation, sick leave, holidays and personal days and/or floating holidays into a benefit called "paid time off" (PTO). PTO allows employees a certain number of days off per year to use for illness, vacation, holidays and personal needs.

Although PTO is an acceptable benefit, the Labor Commissioner considers the entire sum of PTO as vacation because it is not connected to a specific event and can be taken whenever the employee chooses.[23]

PTO is considered wages and you must pay out the entire amount of accrued but unused PTO when the employment relationship is terminated.

The rules relating to vacation also apply to PTO:

- PTO is a form of wages that vests as the employee renders service
- PTO is considered part of the "employment contract" between you and the employee
- No use it or lose it policies allowed
- Reasonable cap on PTO accrual allowed
- Pay of accrued PTO at termination
- Partial-day absence rules for exempt employees
- Payment rules

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[23] DLSE *Enforcement Policies and Interpretations Manual* sec. 15.1.12

For more information, see the discussion of these topics in "Vacation" on page 555.

New 2016

Beginning July1, 2015, California employers are required by law to provide a set amount of paid sick leave to eligible employees working in California. Employers have various options for providing the paid sick leave entitlement to employees.

California's mandatory paid sick leave law calls for a careful review of PTO policies. For more information, see Chapter 20, "Paid Sick Leave."

One option is to have a PTO policy and a separate paid sick leave policy that complies with the Act.

Alternatively, you can incorporate the mandatory paid sick leave requirement into your PTO policy. If your company's PTO policy will cover time off under the mandatory paid sick leave law, you will need to:

- Ensure that your policy meets one of the paid sick leave options for providing paid time off. For more information, see "Calculating Leave - Employer Options" on page 537.
- Review the cap requirements for paid sick leave; employees must be allowed to accrue at least six days or 48 hours of paid sick leave so you cannot impose a lesser cap. Make certain to consider these cap requirements along with the rules regarding reasonable caps on PTO. For example, placing a six days or 48 hours cap on accrual when an employee earns only 40 hours of PTO a year would not be reasonable. A minimum of 1.5 times the annual accrual rate is generally accepted.
- Ensure that employees can use PTO for all of the reasons permitted under the paid sick leave law. For more information see "Permissible Usage" on page 542
- Comply with other mandatory paid sick leave requirements, such as paying employees and other protections under the law.

Although you are not required to pay accrued sick leave to an employee at the time of termination, if you choose to combine sick leave and vacation into a PTO plan, you will be required to pay out the accrued time.

Under the mandatory paid sick leave law, employees who leave employment and are rehired within one year must be allowed to use those previously accrued sick days. However, an employer is not required to reinstate accrued paid time off to an employee who was paid out when he/she left employment. For more information, see "Employee Leaves Employment and Reinstatement" on page 544.

Holidays

You are not required to offer employees time off for holidays, nor are you required to pay for time for holidays granted. If you do offer paid holidays, you choose the holidays that you observe. You also determine eligibility requirements and any requirements for the payment. You can also require that a nonexempt employee be employed for some specified period of time before being eligible for holiday pay.

Exempt employees must be paid if they are ready, willing and able to work and no work is available, such as on a holiday when the company is shut down. You cannot withhold holiday pay from an exempt employee as you would for a nonexempt employee. Exempt employees who perform any work during the workweek in which a holiday occurs must be paid their full weekly salary, whether or not they work on the holiday.

If you are closed on a payday that falls on a Saturday, Sunday or a holiday listed in the California Government Code, you can pay wages on the next business day. For more information, see "Timely Payment" in Chapter 11, page 279.

Depending on your business, you may not be able to give everyone a holiday at a specific time during the year. If commonly celebrated holidays occur during your busiest season or if you merely want to give more flexibility to employees who celebrate other holidays, you can decide to designate a specific number of personal holidays.

Note that accommodation of religious holidays is required in certain circumstances. For more information, see "Religion" in Chapter 26, page 734.

At the beginning of each year, announce which holidays you will grant, if any, and if you will pay for the time. The following holidays are those most commonly granted in California:

- January 1 — New Year's Day
- Presidents' Day
- Last Monday in May — Memorial Day
- July 4 — Independence Day
- First Monday in September — Labor Day
- Fourth Thursday in November — Thanksgiving Day
- Friday after Thanksgiving
- December 25 — Christmas

If you provide paid holidays, you will need to explain what will happen if an employee is required to work on a day you designate as a paid holiday. The courts interpret the policy of giving a paid day off as a contract to do so. Therefore, you must make up the lost benefit to the employee in some manner.

- Pay for all hours worked, plus eight hours of holiday pay at straight-time.
- Pay for all hours worked and provide another day off in lieu of the holiday pay.
- Pay for all hours worked at a premium rate of pay, plus eight hours of holiday pay at straight-time or provide another day off in lieu of the holiday pay. In this situation, you would pay a premium rate not because it is overtime, but because the employee is working on a paid holiday.

Establish a policy for the situation where a holiday falls on a day that is the employee's usual day off. If it is your policy to give that holiday as a paid day and you pay all other employees for that holiday, then also pay the employee in question for the holiday unless your policy clearly specifies otherwise.

When an employee quits or is terminated, you need not pay for future holidays.

Communicating Holiday Policies

If you offer paid holidays as a benefit, include the following information in your employee handbook:

- The specific days observed as paid holidays
- Any requirements for payment for nonexempt employees, such as if they must work the day before and/or the day after the holiday or be on an approved leave to receive holiday pay
- A statement that employees who are not employed at the time the holiday is observed are not paid holiday pay
- A statement that unused holidays do not accrue and are not paid out at termination

If you have a policy requiring employees to work the day before and/or the day after the holiday to receive holiday pay, make sure that you do not deny holiday pay in situations where the employee was absent for a reason protected by law, such as paid sick leave.

Under California's Healthy Families, Healthy Workplaces Act, you cannot deny employees the right to use mandatory paid sick leave or in any manner discriminate against an employee for using paid sick leave. Enforcing a policy in a way that denies an employee additional compensation as a result of the employee using his/her accrued sick leave would be in violation of this Labor Code section.

Therefore, if one of your employees called in sick (and had accrued sick leave available) before and/or after a holiday and you failed to pay the employee the holiday pay, you could be in violation of the anti-discrimination provisions of the paid sick leave law. For more information, see Chapter 20, "Paid Sick Leave." The same concern will also arise if you try to deny holiday pay when the employee is using other types of protected leave, except in limited circumstances.

CalChamber's ***Employee Handbook Creator*** can help you easily create an employee handbook that contains this policy. Purchase at the CalChamber store at store.calchamber.com.

Personal Days and Floating Holidays

Though not required to by law, employers can choose to offer employees personal days or floating holidays as a benefit. A floating holiday is given to an employee to use at his/her discretion. It is not connected to a specific event.

How your organization policy defines personal days or floating holidays determines if you must pay employees for unused days at the end of the employment relationship. If time off is connected to a specific event, such as a birthday or anniversary, treat that time off as a holiday. If an employee can take time off at any time for any reason, treat that time off as vacation time.[24] At termination, you need not pay out personal days or holidays that can be taken only upon the occurrence of a specific event.

You can place a reasonable cap on the accrual of personal days or floating holidays. You must give the employee a reasonable opportunity to take personal days or floating holidays so that he/she can stay below the cap.

> **Example:** You give employees three floating holidays per year. They accrue at the rate of two hours per month. An employee earns one floating holiday after four months of employment, a second after eight months and a third after twelve months. Your policy states that employees can carry over two days, or sixteen hours, of floating holidays each year. You can cap the accrual of floating holidays so the employee who does not use the floating holidays in one year will not earn any more time the following year until he/she uses one or more days of floating holidays.

You could also pay the employee at the end of the year for any accrued and unused floating holidays or allow the employee to carry over all accrued and unused time.

If you offer floating holidays, the best way to control costs is to choose an option other than allowing unlimited accrual. As with vacation and PTO, a floating holiday is earned at the employee's current rate of pay. However, the payout for these types of benefits is typically at a higher rate because it must be paid at the employee's rate of pay at termination.

If you do decide to offer personal days and/or floating holidays, you determine who is eligible, the accrual rate and when the time can be taken. For example, you can require that employees cannot take floating holidays or vacation during your busy season. You can also decide if unused floating holidays are paid out to the employee and whether to cap the accrual if the employee does not take some of the accrued time. You decide the cap amount.

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[24] DLSE *Enforcement Policies and Interpretations Manual* sec. 15.1.12

Religious Accommodation and Floating Holidays

If you have a particularly diverse workforce in terms of race, religion or national origin, you might have noticed that not all employees celebrate the same national holidays. What do you do if a large number of employees celebrate a specific holiday and they all want to take the same day off? You can consider closing down for the day, but for most employers, that is not an option.

If the holiday is religious in nature, you are required by law to provide reasonable accommodation for religious reasons. Closing your business is usually not reasonable. However, you can limit the number of employees who can be gone from the company from a department, a specific job, etc. Employees could take a floating holiday based on seniority, by a random drawing or some other means of choosing a limited number of employees. For more information, see "Religion" in Chapter 26, page 734.

Wage and Hour Issues Related to Floating Holidays

Because an employee can take a floating holiday at any time, the floating holiday is treated as vacation and PTO. The time must accrue, it must vest and any unused floating holidays must be paid out at termination.

If you fail to pay out accrued and unused floating holiday wages at termination, employees can file a wage and hour claim with the Labor Commissioner or in superior court. If the employee wins, he/she can collect a waiting penalty of one day's wage for every day that the wages were unpaid, up to 30 days.

Communicating Floating Holiday Policies

If you decide to provide personal holidays as a benefit for your employees, you should include the following information in your employee handbook:

- Define the number of days employees receive.
- Designate a specific event for which time off can be used, such as the employee's birthday or anniversary with the company.
- Cite any restrictions on the use of the holiday. For example, you could write, "the day must be used the week before, the week of or the week after your anniversary date with the company. Failure to use the day off during that time results in loss of the holiday."

Chapter 22

Miscellaneous Time Off

In certain circumstances, California and federal laws mandate that you allow an employee to take time off work. This required time off includes leaves for:

- Pregnancy disability; for more information, see Chapter 19, "Pregnancy Disability Leave (PDL)"
- Family care; for more information, see Chapter 18, "Family and Medical Leave"
- Mandatory paid sick leave (PSL); for more information, see "Paid Sick Leave" in Chapter 20, page 535.
- Kin care leave; for more information, see "Kin Care" in Chapter 20, page 551
- Workers' compensation; for more information, see Chapter 25, "Workers' Compensation"
- Jury or witness duty
- Voting
- Military service
- Military spouses
- Domestic violence, sexual assault and stalking victims
- Crime victims
- School appearances
- School activities
- Emergency duty as a volunteer firefighter, reserve peace officer or emergency rescue personnel
- Volunteer firefighter, reserve peace officer and emergency rescue training
- Volunteer members of the California Wing of the Civil Air Patrol
- Bone marrow and organ donors

Other optional time off policies that are not mandated by law include:

- Bereavement leave
- Personal leaves of absence
- Education leave
- Sabbaticals

This ***Digest*** devotes entire chapters to some of these leave policies.

Consult this table to determine which types of leave apply to your company:

Leave Type	Employer Size (Number of Employees)
Civil Air Patrol Leave, see "Civil Air Patrol Leave" on page 592	16 or more
Crime Victims' Leave, see "Crime Victims' Leave" on page 586	All
Domestic Violence, Sexual Assault and Stalking Victims' Leave for Legal Proceedings, see "Time Off for Legal Proceedings" on page 582	All
Domestic Violence, Sexual Assault and Stalking Victims' Leave for Medical Treatment, see "Time Off for Medical Treatment: Employers With 25 or More Employees" on page 583	25 or more
Drug and Alcohol Rehabilitation, see "Drug or Alcohol Rehabilitation" in Chapter 9, page 208	25 or more
Emergency Duty as Volunteer, see "Volunteer Civil Service Leave" on page 591	All
Emergency Training, see "Volunteer Civil Service Leave" on page 591	50 or more
Family and Medical Leave, see Chapter 18, "Family and Medical Leave"	50 or more
Jury or Witness Duty, see "Jury or Witness Duty Leave" on page 571	All
Kin Care, see "Kin Care" on page 551	All, applies to employer provided sick leave
Military Leave, see "Military Service Leave (USERRA)" on page 572	All
Military Spouse Leave, see "Military Spouse Leave" on page 580	25 or more
Organ and Bone Marrow Donation Leave, see "Organ and Bone Marrow Donor Leave" on page 593	15 or more
Pregnancy Disability Leave (PDL), see Chapter 19, "Pregnancy Disability Leave (PDL)"	5 or more
School Activities Leave, see "School and Child Care Activities Leave" on page 589	25 or more
School Appearance Leave, see "School Appearance Leave" on page 589	All
Sick Leave, Mandatory, see Chapter 20, "Paid Sick Leave"	All (benefit began July 1, 2015)
Voting Leave, see "Voting Leave" on page 572	All, in limited circumstances

Required Leaves

Federal and state laws mandate leaves for pregnancy disability, family care, personal illness, kin care and workers' compensation. Other sections discuss these types of leave. This chapter discusses additional types of leave required by law. Some of these leaves apply only to some employers. Some require that the time be paid; others do not. Some employers have policies or union contracts that expand the leave time beyond that required by law or create obligations to pay leave time not required by law.

Jury or Witness Duty Leave

At certain times, employees are requested to perform jury duty or appear as a witness in a trial. All employees are protected when they are engaged:

- To serve on an inquest jury or trial jury
- To appear in court in compliance with a subpoena or court order as a witness

Absences from work for these reasons are protected by law; you cannot deny the employee the time off.[1] This requirement applies to all employers, regardless of size. You cannot terminate or discriminate against any employee who takes time off of work to serve on a jury or as a witness as required by law, if the employee gives you reasonable notice of the need for time off.[2] Any employee terminated, threatened with termination, demoted, suspended or discriminated against in any way because of time taken off to serve on a jury or as a witness is entitled to reinstatement and back wages and benefits.[3]

For information on what to do if an employee is a victim of a crime or domestic violence and needs time off to attend individual judicial proceedings, see “Domestic Violence, Sexual Assault and Stalking Victims’ Leave” on page 581 and “Crime Victims’ Leave” on page 586.

Employee Pay While on Jury or Witness Duty

Whether you must pay wages to an employee who takes time off for jury or witness duty depends on his/her status as exempt or nonexempt. You’re not legally required to pay a nonexempt employee’s wages while the employee serves on jury duty or as a witness. However, many employers voluntarily maintain a pay policy for employees on jury duty or serving as a witness, usually in the range of five to 20 days per year. For more information on employee status, see Chapter 4, “Exempt and Nonexempt.”

Rather than take unpaid time, a nonexempt employee who takes time off work to serve on a jury or as a witness can use vacation or personal leave, unless otherwise provided by a collective bargaining agreement.[4]

If the employee is exempt and performed any work during the workweek, you must pay the exempt employee for the entire week. You cannot make deductions from an exempt employee’s salary for absences caused by jury duty or attendance as a witness. But you can make deductions from an exempt employee’s pay if the employee performs no work at all in the workweek.[5]

It is unlikely that an exempt employee will perform no work at all during a workweek. Exempt employees often will check messages before or after jury service, work on a weekend or any other time they are not engaged in jury duty.

Your employees cannot be exempted from jury duty merely because they don’t want to serve, it’s inconvenient or they are needed at work. You cannot get an employee excused from jury duty. Employees may request a onetime postponement of jury service for personal or business reasons. For example, an employee might ask for a postponement because of a planned vacation, business trip or other conflict. The employee will be required to serve on jury duty at a later date, which can be up to six months from the originally scheduled date.

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[1] Lab. Code sec. 230

[2] Lab. Code secs. 230(a) and (b)

[3] Lab. Code sec. 230(e)

[4] Lab. Code sec. 230(g)

[5] DLSE *Enforcement Policies and Interpretations Manual*, sec. 51.6-21

Documentation of Jury or Witness Duty

You can require employees to provide advance notice for jury or witness duty, where it is reasonable to do so. If the employee is unable to give advance notice, you cannot take any action against the employee if he/she can provide certification of the need for leave within a reasonable amount of time after the absence. An employee called for jury duty will receive a summons from the court and can request proof of service from the jury clerk if he/she has to report for duty. The summons or proof of service from the court is sufficient certification.

Return to Work from Jury or Witness Duty

You cannot discriminate against an employee who takes time off for jury or witness duty. Unless there are extenuating circumstances, such as layoffs, you must reinstate the employee to his/her job. If you must lay off an employee who takes jury or witness duty leave, the employee has the same rights and seniority as if he/she had been at work.

For more information on jury duty and your obligations as an employer, visit www.courts.ca.gov/.

Voting Leave

If an employee cannot make sufficient time outside of working hours to vote in a statewide election, he/she can take off up to two hours of working time to vote without loss of pay. This requirement applies to all employers, regardless of size. This time must be used at the beginning or end of the regular working shift, whichever allows the most free time for voting and the least time off from working, unless otherwise mutually agreed upon. The employee must notify you at least two working days in advance to arrange a voting time.[6]

You must post the voting leave requirements in a conspicuous place at least 10 days before every statewide election.[7] In addition, employees can serve as election officials on election day without being disciplined. You are not required to pay employees for absences due to serving as election officials.[8]

A copy of the voting leave requirements is included in the ***California and Federal Employment Notices Poster*** available from CalChamber at store.calchamber.com.

Military Service Leave (USERRA)

Congress provided additional benefits and job protections for individuals returning to civilian employment after serving in the military by passing the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).[9] Under USERRA, you cannot consider the type and nature of service when you determine your obligation to re-employ an individual. These rights supersede former law as well as any less beneficial policy you may have established.

[illegible]

Employers who are covered by USERRA include individuals, successor employers, pension plans, overseas subsidiaries of American organizations and insurance companies that administer life, disability and health plans. When two entities, such as a staffing organization and its client, both exercise control over aspects of an individual's employment, both entities share responsibility for employment and re-employment rights.

Pursuant to the Veterans Benefits Improvement Act of 2004 (VBIA), employers must provide reinstatement rights and other benefits for veterans and employees called for military duty. The law contains two important implications for you:

- The period for continuation of health care coverage is extended from 18 to 24 months.
- You must post an employee notice that describes the rights, benefits and obligations under USERRA.

Posting Requirements

USERRA requires employers to post a notice that provides information on the rights of military service personnel to job reinstatement and other benefits. The only official version of this poster is provided in English because the federal Department of Labor (DOL) stated that all military service personnel must be able to read and understand English.

A copy of the USERRA Notice is included in the ***California and Federal Employment Notices Poster*** available from CalChamber at store.calchamber.com.

You must give this USERRA notice to:

- Current employees who are members of a uniformed service
- Applicants for employment who are members of uniformed services
- Current employees who have applied for membership in a uniformed service
- Dependents of employees who are members of a uniformed service

The most efficient way to comply with USERRA and the VBIA is to post the notice in a prominent place where employees customarily check for information.

Eligibility for Military Service Leave

USERRA protects anyone absent from work due to "service in the uniformed services." USERRA defines "uniformed services" to include the Army, Navy, Air Force, Marine Corps, Coast Guard and the Reserves for each of those branches; Army National Guard; Air National Guard; commissioned corps of the Public Health Service; and any other category of people designated by the president in time of war or national emergency.[10]

"Service" is defined as duty on a voluntary or involuntary basis, including:

- Active duty
- Active duty for training
- Initial active duty for training
- Inactive duty training

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[10] 38 U.S.C. 4303(16)

- Full-time National Guard duty
- Absences for examinations to determine fitness for active duty
- Absences for the purpose of performing funeral honors duty[11]

Employees who are protected by USERRA include mobilized reservists, those absent for enlistment physicals and volunteers in the National Disaster Medical System. Nondiscrimination rules prohibit considering an applicant's military service status or obligations, including ROTC membership, as a negative factor in hiring decisions. You cannot refuse to allow military leave or refuse to re-employ an individual returning from military leave because of the leave's duration or any inconvenience the leave or reinstatement causes you.

Duration of Military Service Leave

USERRA extends the length of leave time and reinstatement rights you must allow for military duty to five years. This five-year limit is the cumulative length of all employment absences due to military service.[12]

There are exceptions to the five-year limit. The following leaves do not count toward the five-year limit:

- Time required beyond five years to complete an initial period of obligated service
- Time during which an individual could not obtain orders releasing him/her from service through no fault of his/her own
- Time required to fulfill additional training requirements that the military determined to be necessary for professional development, completion of skill training and retraining
- Time during which an individual is ordered to remain on (or recalled to) active duty under certain federal laws, especially in times of national emergency[13]

Notice and Documentation of Military Service Leave

All employees must provide advance written or verbal notice of the need for military service leave, unless they are prevented from doing so by military necessity or if providing notice would be impossible or unreasonable.[14]

You can require an individual returning from military service leave to provide documentation establishing that:

- The individual has requested re-employment in a timely fashion.
- The individual hasn't exceeded the cumulative five years of service.
- The individual has not lost his/her entitlement to protection under USERRA due to dishonorable discharge or other factors.[15]

An employee need not report for military duty immediately after leaving his/her employment to be entitled to USERRA re-employment rights. Additional time may be necessary to rest or to arrange his/her affairs before reporting for duty.

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[11] 38 U.S.C. 4303(13)

[12] 38 U.S.C. 4312(a)(2)

[13] 38 U.S.C. 4312(c)

[14] 38 U.S.C. 4312(a)(1); 38 U.S.C. 4312(b)

[15] 38 U.S.C. 4312(f)(1)

Exemptions from Re-employment Requirements of Military Service Leave

You are not required to re-employ an individual returning from military service leave if:

- Your business circumstances have changed so much that re-employment is impossible or unreasonable.
- Retraining or accommodating a disabled individual would pose an undue hardship for you.
- The employment prior to the military leave was for a brief, non-recurrent period, and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.[16]

You bear the burden of proving impossibility, unreasonableness, undue hardship or the brief, non-recurring nature of the employment prior to military service leave.[17]

Rights of Employees Returning from Military Service Leave

An employee need not declare if he/she intends to return to work following military service. No one can waive re-employment rights. An eligible employee who makes a timely application for re-employment must be returned to work even if he/she initially told you that he/she would not be returning.

Employees who are returning from military service are entitled to all the rights and benefits they would have had if they had remained continuously employed. You must treat them in the same manner as you do other employees who are on nonmilitary leaves of absence. You can require employees who are returning from military service to pay the normal employee contribution for benefits if employees on nonmilitary leaves must do so.[18] You need not provide these benefits if the employee provides written notice of his/her intent not to return to your employment after military service.[19]

For pension rights, treat employees who are returning from military service leave as though they did not have any break in service.[20] If the employee requests it, you must permit an employee taking leave for military service to use any accrued paid vacation or similar paid time off (PTO).[21] However, you cannot require an employee to use vacation or PTO for military leave.

Re-employment After Military Service Leave

USERRA requires you to promptly re-employ individuals returning from military service by applying the "escalator principle" as follows:

- **90 days or less of service:** The individual is entitled to be re-employed in the position in which he/she would have been employed had there been no interruption for military service if the individual is qualified to perform that job. If the person is not qualified to perform that job, you must make reasonable efforts to qualify him/her. If those reasonable efforts fail, you must reinstate the person to the position he/she held at the time of beginning military leave.[22] This means that if the individual would have been promoted had he/she not been on military leave, the individual is entitled to the position to which he/she would have been promoted unless unqualified to perform in that position even after reasonable efforts at training.

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[16] 38 U.S.C. 4312(d)(1)

[17] 38 U.S.C. 4312(d)(2)(c)

[18] 38 U.S.C. 4316(a)

[19] 38 U.S.C. 4316(b)(2)

[20] 38 U.S.C. 4318

[21] 38 U.S.C. 4316(d)

[22] 38 U.S.C. 4313(a)(1)

- **More than 90 days of service:** The individual is entitled to be re-employed in the position in which he/she would have been employed had there been no interruption for military service, or in a position of like seniority, status and pay if the individual is qualified to perform one of those jobs. If the person is not qualified to perform one of those jobs, you must make reasonable efforts to qualify him/her. If those reasonable efforts fail, you must re-employ the person in the position he/she held at the time he/she began military leave or a position of like seniority, status and pay.[23]
- **Person with military-related disability:** You must reasonably accommodate an individual with a disability incurred in or aggravated during military service. Place him/her in the position he/she would have held had there been no interruption for military service. If performance of that job is impossible even with reasonable accommodation, you must provide a job of equivalent seniority, pay and status for which the individual is qualified or for which he/she could become qualified with reasonable effort. If neither of these options is possible due to the disability, you must provide another position of lesser status and pay but with full seniority.[24]
- **Two or more individuals entitled to same position:** If two or more individuals are entitled to the same position and report for work, the individual who left the position first has the right to that position.[25]

Unless there are extenuating circumstances, "prompt re-employment" means re-employment within two weeks of applying. Prompt re-employment upon return from weekend National Guard duty is the next regularly scheduled workday. Prompt re-employment after several years of active duty may permit more time, where reassignment or notice must be given to another employee occupying the job. You cannot refuse to re-employ an individual to avoid terminating his/her replacement.

You must determine, with reasonable certainty, whether the employee would have attained merit or performance increases. Consider the returning employee's work and pay raise history and the work and pay raise history of employees in the same or similar positions.

If you cannot easily determine the position, status and pay rate, you must consider factors such as additional training time, a promotion that the employee missed during service and missed opportunities for advancement, responsibility, general working conditions or job location.

Notice of Intent to Return from Military Service Leave

An individual must provide you notice of his/her intent to return to work after serving in the military. The time frame within which the notice is required depends upon the length of military service, as follows:

- **Less than 31 days of service or fitness for duty exam:** Must report no later than the beginning of the first full regularly scheduled work period on the first full calendar day following completion of service, plus time for safe transportation back to the person's residence, plus eight hours.[26] If reporting at that time is impossible or unreasonable through no fault of the individual, then he/she must report as soon as possible.[27]

  Example: Smith's military service of fewer than 31 days is completed at 2:00 p.m. on Monday. He returns to his home by train, arriving at 7:00 a.m. Tuesday. The earliest Smith would be required to return to work is eight hours later, at 3:00 p.m. on Tuesday. If the next full, regularly scheduled work period did not begin until 8:00 a.m. Wednesday, Smith would not be required to report until then.

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[23] 38 U.S.C. 4313(a)(2)

[24] 38 U.S.C. 4313(a)(3)

[25] 38 U.S.C. 4313(b)(1)

[26] 38 U.S.C. 4312(e)(1)(A)(i); 38 U.S.C. [illegible]

[27] 38 U.S.C. 4312(e)(1)(A)(ii)

- **31 days to 180 days of service:** Must submit an application for re-employment no later than 14 days after the completion of service. If submitting an application within that time frame is impossible or unreasonable through no fault of the individual, then he/she must submit the application on the next full calendar day when it becomes possible.[28]
- **More than 180 days of service:** Must submit an application for re-employment no later than 90 days after the service is completed.[29]

Failure to Report or Re-apply After Military Service Leave

A person who fails to report or re-apply as USERRA requires does not automatically forfeit his/her entitlement to USERRA protections. USERRA requires that employers apply their rules, established policy and general practices pertaining to explanations and discipline related to other absences from scheduled work.[30]

Leave Extension for Illness or Injury

Leave can be extended for up to two years for an individual hospitalized for or recovering from an illness or injury incurred or aggravated during military service.[31] If reporting or re-applying to work at the end of the two-year period is impossible or unreasonable due to circumstances beyond the individual's control, you must extend the two-year period.[32]

Prohibitions on Discharge From Employment After Military Service Leave

You cannot terminate an employee who has returned from military service leave within the following time lines, except for cause:

- Within one year if the period of service lasted longer than 180 days
- Within 180 days if the period of service lasted more than 30 days but fewer than 181 days.[33] You must prove cause for dismissal, provide proof that the employee had notice that the conduct would be cause for termination and show that the termination was reasonable. A dismissal may be the result of some other legitimate, nondiscriminatory reason that would have affected any other employee in the same position regardless of protected status. For example, a returning employee may be dismissed as a result of a reduction in force.

Employers who terminate an employee who is protected under USERRA bear the burden of proving that the termination did not relate to the military service.

Health Benefits and Military Service Leave

If the uniformed service lasts 30 or fewer days, health benefits continue. You cannot require the employee to pay more than the normal employee's share of any premium.

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[28] 38 U.S.C. 4312(e)(1)(C)
[29] 38 U.S.C. 4312(e)(1)(D)
[30] 38 U.S.C. 4312(e)(3)
[31] 38 U.S.C. 4312(e)(2)(A)
[32] 38 U.S.C. 4312(e)(2)(B)
[33] 38 U.S.C. [illegible]

For time periods lasting longer than 30 days, USERRA provides COBRA-like continuation benefits for people who are absent from work to serve in the uniformed services, even when their employers are not covered by the Consolidated Omnibus Budget Reconciliation Act (COBRA) or Cal-COBRA. This coverage is available for up to 24 months. The employee cannot be required to pay more than 102 percent of the full premium for the coverage.

Employees or qualified dependents who are eligible for COBRA can choose COBRA. Employees or dependents who are not eligible for COBRA, but who are eligible for Cal-COBRA, can choose Cal-COBRA. Cal-COBRA is available for up to 36 months. The employee and each dependent retain separate, individual rights to continue coverage. For more information on COBRA and Cal-COBRA, see Chapter 17, "Health and Retirement Benefits." You cannot terminate COBRA continuation coverage because an activated reservist receives military health coverage, and the reservist's family receives health coverage under a government program. For more information, see "COBRA" in Chapter 17, page 445.

You must allow employees to resume group health plan coverage upon return to work without a waiting period or other exclusion. You can exclude illnesses or injuries incurred or aggravated during military service because they are covered by the military health plan. Upon re-employment, eligible dependents must be reinstated in your health plan regardless of whether the employee selected continuation coverage and without a waiting period or exclusion.

The Health Insurance Portability and Accountability Act (HIPAA) can provide rights to enroll in a spouse's group health plan regardless of the plan's otherwise established enrollment periods. The employee must request special enrollment within 30 days of losing eligibility for coverage. Coverage is effective no later than the first day of the first month following the request for enrollment.

Family and Medical Leave Eligibility and Military Service

Upon the employee's return to work, you must count the time spent on active duty as time worked for determining eligibility for leave under federal and state family medical leave laws. You must combine the months and hours that the employee would have worked if not engaged in military service with those actually worked to determine if the employee worked the required 1,250 hours in the 12 months preceding the start of a leave.

Retirement Plans and Military Service Leave

You must count the period of military duty as covered service for retirement plan eligibility, vesting and benefit accrual purposes. Accrued benefits resulting from employee contributions are assured to the extent that the employee actually makes the contributions to the plan.

You are not required to make contributions to a 401(k) plan while an employee is on active duty. After you re-employ the employee, you must restart contributions you would have made on behalf of the employee during the period of military service. Your contributions need not include earnings or forfeitures that would have been allocated to employees during military service.

Employees can take three times the period of military duty or five years, whichever is greater, to make up contributions. If the employee makes up the contributions, you must make up any matching employer contributions.

If the plan permits employees who are not affiliated with the military to designate individuals to act on their behalf to change investment allocations or arrange loans from the plan, grant similar rights to employees on military duty.

If an employee borrows money from an employer's retirement plan, the Soldiers' and Sailors' Civil Relief Act (SSCRA) requires that interest charges be reduced to not more than six percent during the period of service. The plan administrator must reduce the rate even if the employee may prefer a higher interest rate to increase accumulations to his/her account, unless the plan obtains a court order permitting a higher rate based on the individual's ability to pay. A plan can suspend the obligation to make regular loan repayments to the plan during the period of active military service, but the plan is not required to do so.

Holidays and Military Service Leave

You need not pay employees who are on military service leave for holidays unless your company pays for holidays during other unpaid leaves of absence of similar duration. In *Tully v. Department of Justice*, a California court considered the length of the employee's military service leave to determine if holiday pay was reasonable, even though the employer paid for holidays during leave for jury or witness duty. Because the employee's military leave was so long, no other comparable leaves existed that required the employer to provide holiday pay.

The employee did not prove that he was denied a benefit generally available to employees on extended leaves of absence. According to the court, the employee's argument that military leave entitles him to the best benefits available to employees on *any* leave misinterpreted the law. The employee is entitled to the benefits available during a *comparable* leave.[34]

Other Benefits Issues and Military Service Leave

Servicemembers may use vacation, PTO or other similar accrued annual leave during military service, but cannot be required to use such leave.[35]

If benefits that do not depend on seniority are determined by type of leave, the returning employee must receive the most favorable treatment associated with any comparable leave, typically of comparable duration. Vacation is considered a non-seniority benefit. Typically, you must provide vacation to employees on military service leave only if you provide it to employees on comparable types of leave.

Military Service Checklist

Military Service Leave (California)

In addition to federal protections, California also provides protections for members of the military.

It is unlawful and a misdemeanor to discriminate against any person because of his or membership or service in a state or federal military branch or because he or she is required to attend military duty, camp or training.[36]

Private employers also cannot restrict or terminate any "collateral benefit" for employees by reason of an employee's temporary incapacitation related to duty in the National Guard or Naval Militia. Temporary incapacitation means any period of incapacitation of 52 weeks or less. "Benefit" includes, but is not limited to, health care (which may be continued at the employee's expense), life insurance, disability insurance and seniority status.

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[34] *Tully v. Department of Justice*, 481 F.3d 1367 (Fed. Cir., 2007)

[35] 38 U.S.C. sec. 4316(d)

[36] Military and Vet. Code section 394

Employers who violate these state laws can be liable for actual damages and reasonable attorneys' fees, as well as other remedies allowed by law.

Moreover, California provides leave protections and return rights, separate from those provided by federal law under USERRA.

Employees who are members of the reserve corps of the United States armed forces, the National Guard or the Naval Militia are entitled to up to 17 calendar days of unpaid leave per year (including time spent going to and returning from duty) for military training, drills, camp, naval cruises, special exercises or similar activities.[37]

If federal law provides more leave to the employee, you must follow federal law.

New 2016

Members of the California National Guard ordered into active state service for emergency purposes or called to active duty are entitled to job protections and return rights.[38] Beginning January 1, 2016, these protections are extended to apply to California employees who are members of the National Guard in another state and are called into service by the other state or by the president, causing them to leave a private job in California.

California also provides leave for qualified military spouses working for covered employers.

Finally, the California Fair Employment and Housing Act (FEHA) protects applicants and employees from discrimination based on "military and veterans status." For more information, see "Military and Veteran Status" on page 730.

Military Spouse Leave

All California employers with 25 or more employees must provide an unpaid leave of absence for spouses of military personnel.[39]

This law is separate from and does not change the obligations of employers with 50 or more employees under the Family and Medical Leave Act (FMLA) to provide qualifying exigency leave and leave to care an for an ill or injured servicemember. For more information, see "FMLA and CFRA Qualifying Reasons" in Chapter 18, page 472.

Military Spouse Request for Leave - 25 or More Employees

Eligibility for Military Spouse Leave

To qualify for military spouse leave, an employee must meet the following requirements:

- Work for a qualified employer that employs 25 or more employees
- Be the spouse of a qualified servicemember
- Work an average of 20 or more hours per week
- Provide you with notice of his/her intention to take the leave, within two business days of receiving official notice that the servicemember will be on leave from deployment.

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[37] Military and Vet. Code section 394.5

[38] Military and Vet. Code section 394.6

[39] Military and Vet. Code sec. 395.10

- Submit written documentation certifying that the servicemember will be on leave from deployment during the time the leave is requested.

The servicemember must meet one of the following requirements for an employee to be eligible for this type of leave:

- Be a qualified member of the United States Armed Forces who was deployed during a period of military conflict to an area designated as a combat theater or combat zone by the president of the United States
- Be a member of the National Guard who has been deployed during a period of military conflict
- Be a member of the Reserves who has been deployed during a period of military conflict[40]

Duration of Military Spouse Leave

Military spouse leave lasts for up to 10 days. The qualified military servicemember must be on leave from deployment during a period of military conflict.

Employee Pay During Military Spouse Leave

Military spouse leave is unpaid. You are not obligated to pay nonexempt employees who are on military spouse leave. However, you must pay exempt employees for any day in which they perform any work. You cannot deduct from the exempt employee's salary for a partial day of absence.

You can allow employees to use vacation, PTO or other similar accrued annual leave during military spouse leave. However, you cannot require them to do so.

If the employee requests to use employer provided paid leave, such as vacation or PTO for a partial or full day of absence, you can deduct the time from the employee's paid time off benefit(s). If the exempt employee works a partial day and does not authorize a deduction from a paid time off benefit, the employee must be paid for the full day.

Rights of Employees Returning from Military Spouse Leave

You cannot retaliate against employees who request or take military spouse leave. You must reinstate any employee to his/her position upon return from military spouse leave.

Domestic Violence, Sexual Assault and Stalking Victims' Leave

Employees who are victims of domestic violence, sexual assault or stalking may need time off for legal proceedings, such as obtaining a restraining order, or for medical treatment. Employers have various obligations related to providing such leave. Employees are entitled to mandatory paid sick days (as of July 1, 2015) and also unpaid leaves of absences.

Mandatory Paid Sick Leave for Victims

ew 2016

On July 1, 2015, employees began accruing mandatory paid sick days under the Healthy Workplaces, Healthy Families Act. For more information, see Chapter 20, "Paid Sick Leave."

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[40] Military and Vet. Code sec. 395.10

Employees that are victims of domestic violence, sexual assault or stalking can use accrued mandatory paid sick leave when they need time off to appear in legal proceedings or for medical treatment. The mandatory paid sick leave law specifically states that employees can use accrued paid sick leave for these purposes. This law allows for paid time off for what would otherwise be an unpaid leave.

Employers must also allow employees to use kin care for legal proceedings or medical treatment related to domestic violence.[41] For more information, see "Kin Care" in Chapter 20, page 551.

Employers cannot discharge, discriminate, or retaliate against a victim of domestic violence, sexual assault or stalking for using covered paid sick leave or kin care for these purposes.

Time Off for Legal Proceedings

Employees who are victims of domestic violence, sexual assault or stalking may need time off to appear in related legal proceedings or for other purposes. Absence from work for victims of domestic violence or sexual assault is protected by law. You cannot deny the employee the time off.

All employers, regardless of size, are prohibited from discharging, discriminating or retaliating against an employee who is a victim of crime who takes time off from work to appear in court to comply with a subpoena or other court order or to serve as a witness in any judicial proceeding.[42] For more information, see "Crime Victims' Leave" on page 586.

All employers are subject to the same prohibitions regarding an employee who is the victim of domestic violence, a victim of sexual assault or a victim of stalking, and who takes time off from work to obtain or attempt to obtain any relief. Relief includes, but is not limited to:

- A temporary restraining order
- A restraining order
- Other court-ordered relief to help ensure the health, safety or welfare of the victim or his/her child[43]

Requesting Leave

Employees who are the victims of domestic violence, sexual assault or stalking may be required to give reasonable advance notice of the intent to take time off, unless notice is not feasible.

The employer cannot take action against an employee for taking an unscheduled absence for this reason if the employee provides a certification of the need for leave to the employer within a reasonable time.[44]

This certification may be any of the following:[45]

- A police report indicating that the employee was a victim of domestic violence, sexual assault or stalking.
- A court order protecting or separating the employee from the perpetrator of the act of domestic violence sexual assault, or stalking.
- Other evidence from the court or prosecuting attorney that the employee has appeared in court.

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[41] Lab. Code sec. 230.8

[42] Lab. Code sec. 230(b)

[43] Lab. Code sec. 230(c)

[44] Lab. Code sec. 230(d)

[45] Lab. Code sec. 230(d)

- Documentation from a medical professional, domestic violence advocate or advocate for victims of sexual assault, health care provider or counselor that the employee was undergoing treatment for physical or mental injuries or abuse due to domestic violence, sexual assault or stalking.

The mandatory paid sick leave law is silent as to whether any documentation of the need for time off can be required. Employers should exercise caution and consult legal counsel before taking any adverse action against an employee for failure to provide documentation.

Employers must maintain the confidentiality of any employee who requests leave as a result of domestic violence, sexual assault and stalking.

Employees may use any vacation, personal leave or other time off available to them for the purpose of leave for crime victims and victims of domestic violence, sexual assault or stalking (see also, "Mandatory Paid Sick Leave for Victims" on page 581).

Time Off for Medical Treatment: Employers With 25 or More Employees

Employees who are victims of domestic violence or sexual assault and who work for an employer with 25 or more employees are protected from termination, discrimination or retaliation for taking time off from work for the following reasons:

- To seek medical attention for injuries caused by domestic violence, sexual assault or stalking
- To obtain services from a domestic violence shelter, program or rape crisis center as a result of domestic violence sexual assault or stalking
- To obtain psychological counseling related to domestic violence sexual assault or stalking
- To participate in safety planning and take other actions to increase safety from future domestic violence, sexual assault or stalking, including temporary or permanent relocation[46]

This leave is in addition to the requirements related to time off for legal proceedings.

Employees must give reasonable advance notice of their intent to take time off, if feasible. Employees who cannot give reasonable advance notice may not be disciplined or discharged if they can provide certification of the need for leave within a reasonable time. The certification may be any of the following:

- A police report indicating that the employee was a victim of domestic violence, sexual assault or stalking
- A court order protecting or separating the employee from the perpetrator of an act of domestic violence, sexual assault or stalking, or other evidence from the court or prosecuting attorney that the employee appeared in court
- Documentation from a medical professional, domestic violence advocate or advocate for victims of sexual assault, health care provider or counselor that the employee was undergoing treatment for physical or mental injuries or abuse resulting in victimization from an act of domestic violence, sexual assault or stalking

The mandatory paid sick leave law is silent as to whether any documentation of the need for time off can be required. Employers should exercise caution and consult legal counsel before taking any adverse action against an employee for failure to provide documentation.

Employers must maintain the confidentiality of any employee who requests leave as a result of domestic violence, sexual assault or stalking.

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[46] Lab. Code sec. 230.1

Employees can use available employer provided accrued leave for domestic violence or sexual assault victims' leave (see also, "Mandatory Paid Sick Leave for Victims" on page 581).

Domestic violence, sexual assault and stalking victims' leave for medical treatment does not exceed or add to the unpaid leave time that the FMLA allows. This leave is limited to 12 weeks in a 12-month period.[47]

Discrimination Protections

An employer cannot discriminate or retaliate against an victim of domestic violence, sexual assault or stalking for taking time off work for legal proceedings or medical treatment.

It is also unlawful to discharge or in any manner discriminate or retaliate against an employee because of his/her status as a victim of domestic violence, sexual assault, or stalking if either:

- The victim has provided notice to their employer of their status as a victim of one of these types of crimes; or
- The employer has actual knowledge of the status.[48]

This anti-discrimination protection is irrespective of whether the employee has requested time off.

An employee who is denied his/her rights under either of the laws providing unpaid leave to victims of domestic violence, sexual assault and stalking leave laws is entitled to reinstatement and reimbursement for lost wages and work benefits. If you willfully refuse to rehire, promote or otherwise restore an employee as required by a grievance procedure or hearing, you are guilty of a misdemeanor. The employee can take up to one year to file a complaint against you with the state Division of Labor Standards Enforcement (DLSE).

If you must lay off an employee who is taking unpaid domestic violence, sexual assault or stalking leave, the employee has the same rights and seniority as if he/she had been at work.

Consult legal counsel before taking any action against an employee who takes unpaid domestic violence, sexual assault and stalking leave. Employees are entitled to protections under the law.

Finally, the mandatory paid sick leave law prohibits discharge, discrimination or retaliation against a victim of domestic violence, sexual assault or stalking for using covered sick leave for these purposes.

Accommodating Victims

All employers are required to provide reasonable accommodations for employees who are victims of domestic violence, sexual assault or stalking, and who request an accommodation for their safety while working.[49]

An employer is not required to provide a reasonable accommodation where the employee has not disclosed his or her status as a victim of domestic violence, sexual assault, or stalking.[50]

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[47] Lab. Code sec. 230.1(a) - (f)

[48] Lab. Code sec. 230(e)

[49] Lab. Code sec. 230(f)(1)

[50] Lab. Code sec. 230(f)(3)

Reasonable accommodations may include any of the following:[51]

- Implementation of safety measures, including a transfer, reassignment, modified schedule, changed work telephone, changed work station or installed lock
- Assistance in documenting domestic violence, sexual assault or stalking that occurs in the workplace
- An implemented safety procedure
- Other adjustment to a job structure, workplace facility or work requirement in response to domestic violence, sexual assault or stalking
- Referral to a victim assistance organization

The employer must engage in a timely, good faith, interactive process with the employee to determine effective reasonable accommodations.[52] In determining whether the accommodation is or is not reasonable, the employer must consider the exigent circumstance or danger facing the employee.[53]

Employers do not have to make accommodations that constitute an "undue hardship." Undue hardship can mean that the accommodation is unduly costly, extensive or substantial to you or that would fundamentally alter the nature your business's operation. For more information, see "Undue Hardship" in Chapter 28, page 855.

For purposes of this law, an undue hardship also includes an action that would violate an employer's duty to furnish and maintain a place of employment that is safe and healthful for all employees.[54]

If circumstances change and an employee needs a new accommodation, the employee must request it and the employer must engage in the good faith interactive process again.[55] If an employee no longer needs an accommodation, he/she must also notify the employer.

Documentation of Reasonable Accommodation

An employer can request the employee to provide a written statement signed by the employee (or an individual acting on the employee's behalf) and certifying that the accommodation is for an authorized purpose.[56]

The employer may also request certification from an employee who is requesting an accommodation that demonstrates the employee's status as a victim of domestic violence, sexual assault or stalking. The same certification that is acceptable for taking time off for legal proceedings is also acceptable for this purpose. For more information, see "Time Off for Legal Proceedings" on page 582.

An employer can request recertification of an employee's status every six months.

Any documentation, such as a police record or any verbal or written statement that identifies the employee as a victim of domestic violence, sexual assault or staking must be maintained as confidential. It cannot be disclosed except as required by federal or state law, or as necessary to protect the employee's safety in the workplace. The employee must be given notice before any authorized disclosure.

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[51] Lab. Code sec. 230(f)(2)

[52] Lab. Code sec. 230(f)(4)

[53] Lab. Code sec. 230(f)(5)

[54] Lab. Code sec.230(f)(6)

[55] Lab. Code sec.230(f)(7)

[56] Lab. Code sec.230(f)(7)

Crime Victims' Leave

There are two types of crime victims leave — victim leave for judicial proceedings related to specified serious crimes and leave for any proceeding involving victims rights.

Victims of Crime Leave Checklist

Victims' Leave for Judicial Proceedings Related to the Crime

Labor Code section 230.2 prohibits an employer from discriminating against an employee who is a crime victim for taking time off to appear in court to attend judicial proceedings related to the crime. The employee can take the leave after providing notice of the scheduled proceeding; such notice is provided to victims by the courts, prosecuting offices or victim advocate offices.

The leave can be of any length. However, the time off from work must be used to attend judicial proceedings related to a:

- Violent felony
- Serious felony
- Felony theft or felony embezzlement

An employee who is a victim of one of these serious crimes or whose immediate family member is a crime victim can take time off to attend judicial proceedings related to that crime.[57] Employers may not discharge or discriminate against an employee who is absent to attend judicial proceedings related to a crime. This protection extends to compensation or other terms, conditions or privileges of employment. It also includes protection of seniority.

You must allow an employee to take time off from work to attend judicial proceedings related to one of these serious crimes if the employee is:

- A victim of a crime
- A crime victim's immediate family member
- A crime victim's registered domestic partner
- A child of a registered domestic partner who is a crime victim[58]

Immediate family members include the employee's:

- Spouse
- Child or stepchild
- Brother or stepbrother
- Sister or stepsister
- Mother or stepmother
- Father or stepfather

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[57] Lab. Code sec. 230.2

[58] Lab. Code sec. 230.2(b)

Documentation of Victims' Leave for Judicial Proceedings Related to the Crime

Before taking leave to attend the judicial proceeding, the employee must give you a copy of the notice of each scheduled proceeding. These notices are provided to the victim by the pertinent government agency. Documentation can come from any of the following sources:

- The court or government agency setting the hearing
- The district attorney or prosecuting attorney's office
- The victim or witness assistance office advocating on the victim's behalf

When advance notice is not feasible, or if an unscheduled absence occurs, you cannot take action against the employee if he/she, within a reasonable time after the absence, provides documentation from one of the above sources confirming the judicial proceeding.

Rights of Employees Using Victims' Leave for Judicial Proceedings Related to the Crime

Employees can use accrued sick time, vacation, personal leave or PTO for victims' leave to attend judicial proceedings related to the crime. An employee can also use unpaid leave time. Leave cannot be reduced by any collective bargaining agreement term or condition. Records regarding the employee's absence from work for this purpose are to be confidential.

All employers are prohibited from discharging, discriminating or retaliating against an employee who takes time off from work to appear in court to comply with a subpoena or other court order as a witness in any judicial proceeding.[59]

You cannot terminate or discriminate against an employee who is absent to attend judicial proceedings related to a crime. The employee is entitled to the conditions and privileges of employment, including seniority.[60]

An employee who is denied his/her rights under this victims' leave law can file a complaint with the DLSE within one year from the date that the violation occurred.

If you must lay off an employee who takes crime victims' leave, the employee has the same rights and seniority as if he/she had been at work. If you must terminate or lay off an employee who takes crime victims' leave, consult legal counsel.

Leave for Any Proceeding Involving Victims' Rights

Labor Code section 230.5 provides protections for crime victims to take time off from work, at the victim's request, to appear in court to be heard at any proceeding in which a right of the victim is at issue. Labor Code section 230.5 prohibits an employer from discriminating against an employee who takes such time off.

Unlike the leave under section 230.2, this leave can be initiated at the victim's request and does not need to be initiated by a notice from a government agency.

For this particular leave, you are required to provide time off from work to a "victim" which is defined as "any person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or a delinquent act."[61]

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[59] Lab. Code sec. 230(b)

[60] Lab. Code sec. 230.2

[61] Lab. Code sec. 230.5(f)

A victim includes various family members' for whom you will have to provide leave. A victim also includes the person's:

- Spouse
- Parent
- Child
- Sibling
- Guardian

The leave can be of any length. The employee must be a victim, as defined above, of one of the following covered offenses:

- Vehicular manslaughter while intoxicated
- Felony child abuse likely to produce great bodily harm or a death
- Assault resulting in the death of a child under eight years of age
- Felony domestic violence
- Felony physical abuse of an elder or dependent adult
- Felony stalking
- Solicitation for murder
- A serious felony, such as kidnapping, rape or assault
- Hit-and-run causing death or injury
- Felony driving under the influence causing injury
- Specified sexual assault

An employee who is a victim of one of these crimes can take time off to attend proceedings related to that crime. The law protects time off to attend any "proceeding," including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision; or any proceeding in which a right of the victim is at issue.

Employers may not discharge, demote, suspend, discriminate or retaliate against an employee who is absent to appear in court to be heard at any proceeding in which a right of the victim is at issue. This protection extends to compensation or other terms, conditions or privileges of employment.[62]

Documentation of Leave for Proceedings Involving Victims' Rights

This type of leave can be taken at the victim's request. However, before taking this type of leave, the employee must give you reasonable advance notice of his/her intention to take the time off. When advance notice is not feasible, or if an unscheduled absence occurs, you cannot take action against the employee if he/she, within a reasonable time after the absence, provides you with certification.

Any one of the following forms will be sufficient:

- A police report indicating that the employee was a victim of one of the specified offenses
- A court order protecting or separating the employee from the perpetrator of one of the specified offenses.

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[62] Lab. Code sec. 230.5(f)

- Documentation verifying that the employee was undergoing treatment for physical or mental injuries or abuse as a result of being a victim of one of the specified offenses. Documentation must be accepted from a:
  - Medical professional
  - Domestic violence advocate
  - Victims of sexual assault advocate
  - Health care provider
  - Counselor

Rights of Employees Using Leave for Proceedings Involving Victims' Rights

Leave to attend proceedings involving victims' rights is unpaid, but employees can use available vacation or personal leave while on leave.[63] Unlike the leave under section 230.2, sick leave is not specifically included. Leave cannot be reduced by any collective bargaining agreement term or condition.

You must maintain the confidentiality of any employee requesting this leave. You cannot terminate, discriminate or retaliate against an employee who is absent to attend judicial proceedings involving his/her victim rights.

An employee who is denied his/her rights under this leave law can file a complaint with the Department of Labor Standards and Enforcement (DLSE) within one year from the date that the violation occurred.[64] A violation of this leave law entitles the employee to reinstatement and reimbursement for lost wages and work benefits. Refusal to reinstate someone wrongfully fired under this law is a misdemeanor.[65]

School Appearance Leave

Sometimes, an employee may need to appear at his/her child's or ward's school in connection with disciplinary action by the school. The Education Code requires that parents or guardians attend class with the student when the student is suspended. All employers, regardless of size, are prohibited from discriminating against an employee who takes time off to appear at his/her child's or ward's school in connection with a suspension from a class or school.[66] The time off can be paid or unpaid.

Documentation of School Appearance Leave

The parent or guardian should receive a written notice from the school stating that they must attend a class. You can require a copy of the notice or some other certification from the school stating that the employee's presence is required.

School and Child Care Activities Leave

Employees often want to take time off to participate in a child's school or child care related activities, such as teacher conferences, award ceremonies or school plays. They also may need time off to deal with enrolling children in school or in child care, or for school or child care emergencies.

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[63] Lab. Code sec. 230.5(e)

[64] Lab. Code sec. 230.5 (d),(e)

[65] Lab. Code sec. 230.5(c)

[66] Lab. Code sec. 230.7

Employers with 25 or more employees working at the same location must permit employees to take time off to participate in certain school or child care activities.[67] Covered employees can take up to 40 hours each year for the specified school and child care activities.

An employer cannot terminate, or in any way discriminate against, a covered employee for taking the time off. An employer who violates this law may be required to rehire the employee and/or reimburse the employee for lost wages and work benefits. Willful failure to rehire can lead to a penalty of three times the amount of lost wages and work benefits.

New 2016

California recently expanded:

- The reasons that an employee can take time off for school and child care issues; and
- The categories of employees who can take protected time off.

Beginning January 1, 2016, the following are the legal requirements for school or child care activities leave.

Covered Employees

Employees who are the "parents" of children of kindergarten age through grade 12, or with a licensed child care provider, are eligible for this protected leave:

"Parents" are specifically defined to include the following eligible employees:

- Parents
- Guardians
- Grandparents
- Stepparents
- Foster parents
- Persons standing *in loco parentis* to a child

Covered Activities and Guidelines

A covered employee can use the time off for the following reasons and under the following guidelines:

- To find, enroll, or re-enroll his or her child in a school or with a licensed child care provider;
- To participate in activities of the school or licensed child care provider;
- The time must not exceed 40 hours per year, nor eight hours in a calendar month; and
- The employee must give reasonable prior notice of the planned absence.

The employee can also use time off to address a "child care provider or school emergency." There is not an eight hours per calendar month limitation on this emergency usage.

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[67] Lab. Code sec. 230.8

A child care provider or school emergency means that the employee's child cannot remain in a school or with a child care provider due to one of the following:

- The school or child care provider has requested that the child be picked up, or has an attendance policy (excluding planned holidays) that prohibits the child from attending or requires the child to be picked up from the school or child care provider;
- Behavioral or discipline problems;
- Closure or unexpected unavailability of the school or child care provider, excluding planned holidays; or
- A natural disaster, including, but not limited to, fire, earthquake or flood.

If there is a child care provider or school emergency, the employee must give notice to the employer; because these are emergency situations only “notice” is required — there is no reasonableness requirement.

If more than one parent is employed at the same worksite, you can limit the absence to the parent who first gave notice. You need not grant another parent employee a planned absence for a school activity. Another parent who is seeking simultaneous time off can be required to obtain your approval for the time off.

You can require the employee to first use existing vacation, PTO or other personal leave. The employee may also use time off without pay for this purpose, to the extent made available by the employer.

Documentation of Leave

You can require employees to provide documentation that they were engaged in the covered child-related activities described above. Acceptable documentation includes any written verification of participation that the school or licensed child care provider deems appropriate and reasonable.

School Activities Leave Checklist

Volunteer Civil Service Leave

You must allow volunteer firefighters and other emergency personnel to take time off for certain purposes. You are not required to pay for the leave. Employers of 50 or more employees now have a greater obligation to provide time off for this purpose than do smaller employers.

Volunteer Civil Service Leave Checklist

Eligibility for Volunteer Civil Service Leave

All employers must provide leaves of absence for employees who are required to perform emergency duty. You are not required to compensate the employee during this time off. An employee who is denied volunteer civil service leave is entitled to reinstatement and reimbursement for lost wages and work benefits. Refusing to provide the leave as required by law is a misdemeanor.[68] The amount of time an employee can use for volunteer civil service leave is unlimited.

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[68] Lab. Code sec. 230.3

The law applies to:

- Volunteer firefighters
- Reserve peace officers
- Emergency rescue personnel, defined as any person who is an officer, employee, or member of:
  - A fire department, fire protection or firefighting agency of the federal government, California state government, local government, special district or other public or municipal corporation or political subdivision of California
  - An officer of a sheriff's department, police department or private fire department

The law protects members of disaster medical response teams sponsored or requested by the state.

Also, an employee who is a health care provider must notify his or her employer at the time he/she is designated as emergency rescue personnel and then again when the employee learns that he/she will be deployed for emergency duty.[69]

Training Leave for Emergency Rescue Personnel

If you employ 50 or more people, you must allow temporary leaves of absence — up to a total of 14 days per calendar year — to engage in fire, law enforcement or emergency rescue training for employees who are:[70]

- Volunteer firefighters
- Reserve peace officers
- Emergency rescue personnel

Rights of Employees Returning from Volunteer Civil Service Leave

You cannot terminate, threaten with termination, demote, suspend or otherwise discriminate against an employee who takes time off to engage in fire or law enforcement training. An employee who suffers any of these consequences is entitled to reinstatement and reimbursement for lost wages and work benefits.The employee can file a claim with the DLSE.

Civil Air Patrol Leave

California employers with more than 15 employees must provide employees with up to 10 days of leave per year for Civil Air Patrol duty.[71]

"Employee" means a person who may be permitted, required or directed by an employer for wages or pay to engage in any employment and who has been employed by the employer for at least a 90-day period immediately preceding the beginning of leave, if otherwise eligible for leave.[72]

The employee must be a volunteer member of the California Wing of the civilian auxiliary of the U.S. Air Force Civil Air Patrol, responding to an emergency operation mission. You cannot discriminate against or discharge an employee because of membership in the Civil Air Patrol. You cannot prevent the employee from performing service.

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[69] Lab. Code sec. 230.3(c)(2)

[70] Lab. Code sec. 230.4

[71] Lab. Code secs. 1500 - 1507

[72] Lab. Code sec. 1501(b)

An employee is entitled to up to 10 days of leave per year. However, the leave for a single emergency mission cannot exceed three days, unless the emergency is extended by the entity in charge of the operation and you approve the leave extension.

You cannot require employees to exhaust all accrued vacation, personal time, PTO or other available leave to take Civil Air Patrol leave. The leave is unpaid, but you can choose to provide paid leave.

Employees must be reinstated to the position held when the leave began, or to an equivalent position. The employer and employee can negotiate for the employer to maintain the employee's benefits during the leave at the employer's expense. Employees cannot lose benefits that accrued before the date on which the leave began.

Documentation of Civil Air Patrol Leave

You can require certification from the proper Civil Air Patrol authority to verify the employee's eligibility for leave requested or taken. If the employee fails to provide the required certification, you can deny the leave to be taken as Civil Air Patrol leave.

Civil Air Patrol Leave Checklist

Organ and Bone Marrow Donor Leave

California employers with 15 or more employees must provide employees who choose to donate an organ or bone marrow with paid leave:

- Organ donors must be provided a leave of absence of up to 30 business days in any one-year period.
- Bone marrow donors must be provided a leave of absence up to five business days in any one-year period, calculated from the date the employee's leave begins.[73]

For purposes of these leaves, a "one-year period" is 12 consecutive months from the date the employee begins his/her leave; not one calendar year.

The employee must take the leave to donate an organ or bone marrow to another person. The employee must provide you with written verification of the need for donation leave. The verification must state that the employee is a bone marrow or organ donor and that the donation is medically necessary.

"Employee" means a person who may be permitted, required or directed by an employer for wages or pay to engage in any employment and who has been employed by the employer for at least a 90-day period immediately preceding the beginning of leave, if otherwise eligible for leave.[74]

For the purposes of salary adjustments, sick leave, vacation, PTO, annual leave or seniority, the donation leave is not a break in service. You must treat an employee who takes donation leave as though he/she had remained at work.

You can require an employee who requests leave for bone marrow donation to take up to five days of accrued paid sick, PTO or vacation time. You can require an employee who requests leave for organ donation to take up to two weeks of accrued paid sick, PTO or vacation time.

After that, or if the employee does not have any accrued time, the employer must provide paid leave up to the time limits provided.

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[73] Lab. Code secs. 1508 - 1513

[74] Lab. Code secs. 1509(a), 1501(b)

New 2016

California employers were required to begin providing mandatory paid sick leave benefits as of July 1, 2015 (AB 1522/the Healthy Workplaces, Healthy Families Act). For more information, see Chapter 20, "Paid Sick Leave." The legislation is silent as to how mandatory paid sick leave will be treated in relation to organ and bone marrow leave. These mandatory paid sick days may be treated the same as optional employer provided sick days were treated in the past. In other words, you could require the employee who requests leave for bone marrow donation to take up to five days of accrued mandatory paid sick time and require an employee who requests leave for organ donation to take up to two weeks of accrued mandatory paid sick time. Seek advice of counsel with any specific questions.

During organ or bone marrow leave, you are required to maintain and pay for coverage under a group health plan for the full duration of the leave in the same manner that the coverage would have been maintained if the employee had been actively at work during the leave period.

Organ and bone marrow donation leave cannot be taken concurrently with the California Family Rights Act (CFRA). The Labor Code also states that organ and bone marrow donation leave cannot be taken concurrently with leave under the FMLA. Consult legal counsel if your employee is eligible for FMLA.

An employee can take organ and bone marrow donation leave in one or more periods of time.

Rights of Employees Related to Organ and Bone Marrow Donation Leave

You must reinstate an employee returning from organ and bone marrow donation leave to the position he/she held when the leave began or to a position with equivalent seniority, benefits, pay and other terms. You can refuse to reinstate an employee if the reason is unrelated to the exercise of rights under the donor leave.

You cannot terminate, fine, suspend, expel, discipline or discriminate against an employee who takes organ and bone marrow donation leave or who opposes illegal practices related to organ and bone marrow donation leave. Employees can bring a civil action in superior court to enforce the organ and bone marrow donation leave.

Employees who need to take time off to donate an organ may also be protected under state and federal laws against disability discrimination. A California court ruled that an employee who requested a leave of absence to donate a kidney to his sister can pursue a claim that he was discriminated against based on his association with a disabled person. The employee was not able to seek protection under a state donor protection law because it was not in effect at the time he sought leave.[75]

For more information on this protection against disability discrimination, please see "Disability Association Claims" in Chapter 28, page 874.

Employees cannot lose benefits that accrued before the date on which the leave began.

There are no implementing regulations for this law, at this time.

You need not maintain a written policy for organ and bone marrow donation leave. However, if you require an employee who requests organ and bone marrow donation leave to use paid sick, PTO or vacation leave, include this information in your employee handbook.

CalChamber's ***Employee Handbook Creator*** can help you easily create an employee handbook that contains this policy. Purchase at the CalChamber store at store.calchamber.com.

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[75] *Rope v. Auto-Chlor System of Washington, Inc.*, 220 Cal.App.4th 635 (2013)

Optional Leaves

Many employers establish policies that create leaves of absence for other purposes. Employers recognize that employees need to deal with normal life events. Policies for optional leave help employers respond to those needs in a consistent and predictable manner. The following sections describe the most typical leaves that are not mandated by law.

Extended Disability Leave

State and federal laws mandate disability leave:

- For pregnancy disability; see Chapter 19, "Pregnancy Disability Leave (PDL)," for more information
- For family and medical leave; see Chapter 18, "Family and Medical Leave," for more information
- As a reasonable accommodation for a recognized disability; see "Extended Disability Leave as a Reasonable Accommodation" in Chapter 28, page 853 for more information

Bereavement Leave

Bereavement leave is time off for an employee when a death occurs in his/her family. Companies that provide bereavement leave generally offer anywhere from one to five days of paid leave. Some companies offer additional unpaid leave depending on the circumstances, if the travel distance is great or an employee is designated the executor of the estate. You determine if time off is granted, how much time off is granted and if the time off is paid, unpaid or a combination of both.

The law does not require you to provide bereavement leave. If you choose to provide bereavement leave, your policy should communicate how much time is allowed, which family members are covered by your policy and if the time is paid.

Bereavement Leave and Wage and Hour Issues

You need not pay nonexempt employees for any time that they do not work, including partial days of absence. You must pay exempt employees for any day in which they perform any work. If the exempt employee is absent for one full day or more, you can deduct from his/her salary in increments of one full day or more.

> **Example:** An exempt employee requests leave to attend his mother's funeral in another state. You grant the leave, and remind the employee that your policy provides for up to five days of paid bereavement leave. The employee asks for an additional two workdays because of the travel involved. You grant two days of unpaid bereavement leave. If the exempt employee does not work on those two days, you need not pay him/her for that time. Under your policy, you pay for five working days of bereavement leave and the employee takes two unpaid days. As an alternative, the exempt employee might request to use paid time off, such as vacation.

Documentation of Bereavement Leave

You can, by policy, require documentation that the deceased was related to a "family member" of your employee. Examples include a death notice from a newspaper or a memorial card from a funeral home.

Bereavement Leave Checklist

Personal Leaves of Absence

You need not provide time off for employees who want to take leaves of absence for personal reasons. Providing time off for this purpose is entirely a matter between you and your employees. If you grant a personal leave for one employee, you set a precedent for other employees. If you deny personal leave in the future, you may face discrimination claims. Any policies should be consistently applied.

Unpaid Personal Leave

Employers who are not covered by family medical leave laws or who want to provide time off for other reasons can choose to grant unpaid personal leave. You may want to grant unpaid personal leave for the following reasons:

- The employee has an illness or injury that exceeds the time granted by your company policy or required by law.
- The employee must care for a family member who is not covered by your company policy or law.
- Your employee needs or wants to stay home with a newborn or newly adopted child beyond the period allowed by PDL or FMLA/CFRA.
- The employee is not eligible for family medical leave.
- The employee wants to visit home and the distance is such that normal vacation time is insufficient.
- The employee wants to take an extended trip, such as a trip around the world, and does not have enough vacation time to cover it.

You decide whether to provide unpaid personal leave. You also decide if there are any eligibility requirements for unpaid leave, the amount of time available, which benefits are continued during leave and the employee's reinstatement rights.

The law does not require you to provide unpaid personal leave. If you do offer unpaid personal leave as a benefit, document the requirements or restrictions in your employee handbook. Apply the policy fairly and evenly to all employees who are covered by the benefit.

Since this is unpaid time, do not pay the employee. The exception would be if an exempt employee performs some work, he/she must be paid for the full day if they perform any work in that day.

When an employee requests a personal leave and you are covered under state or federal family leave laws, you should always question the employee about the reason for the leave to determine whether it qualifies as family leave (for example, to care for an ill parent). See Chapter 18, "Family and Medical Leave," for more information about the FMLA/CFRA.

Unpaid Personal Leaves of Absence Checklist

Education Leave

To encourage employees to seek more education, you might want to offer a period of time off for education purposes. You are not required to provide education leave. You decide whether to offer education leave. If you offer education leave, document the requirements or restrictions in your employee handbook. Apply the policy fairly and evenly to all employees who are covered by the benefit.

If you require employees to take specific training courses, or that they complete a job-related degree program that will benefit you, then you must pay them for the time they spend in the training, as well as for the training itself.

If you grant employees time off to take courses or to complete a degree program that is not job-related or will not lead to a promotion, you need not pay them for their time or any educational expenses.

If an employee discloses a problem with illiteracy, employers with 25 or more employees must accommodate and assist that employee. For more information, see "Employee Illiteracy" in Chapter 8, page 138.

Education Leave Checklist

Sabbaticals

A sabbatical is usually associated with academia; specifically, with professors who have long tenure with a college or university. In the past, strong unions bargained for sabbaticals as a reward for length of service in an organization. You are not required to provide sabbaticals.

You decide whether to offer a sabbatical. A sabbatical can be paid or unpaid, but it is an extension of vacation that is usually associated with some length of service. Some sabbaticals are given so that the employee can take a period of time off or to continue his/her education or advanced training.

If you do offer sabbatical leave as a benefit, document any requirements or restrictions in your employee handbook. Apply the policy fairly and evenly to all employees covered by the benefit.

Nonexempt employees do not need to be paid if they perform no work. Exempt employees must be paid at least the minimum salary requirement ($2,773.33 per month) if you wish to maintain their exempt status and you expect that they perform some work while on sabbatical. If an exempt employee's sabbatical involves no work or training, no compensation would be required. It would simply be unpaid leave.

For information on sabbaticals and final pay, see "Sabbatical Versus Vacation" in Chapter 21, page 561.

Sabbatical Leave Checklist

Further Information

Civilian employers of military personnel can find more information from the following organizations:

- The Veterans' Employment and Training Service (VETS):

  The Veterans' Employment and Training Service within the U.S. Department of Labor offers an online "elaws Advisor" to better inform employees and employers about their rights and obligations under USERRA. Visit the elaws Advisor at www.dol.gov/elaws/userra0.htm.

- The Employer Support of the Guard and Reserve (ESGR): The ESGR is an agency within the Office of the Assistant Secretary of Defense for Reserve Affairs. The ESGR promotes cooperation and understanding between Reserve component members and their civilian employers and assists in resolving conflicts arising from an employee's military commitment.
  Contact the ESGR at:

  ESGR
  4800 Mark Center Dr., Suite 03E25
  Alexandria, VA 22350-1200
  (800) 336- 4590
  Or visit the ESGR website at: www.esgr.mil

- The *Nontechnical Resource Guide to the Uniformed Services Employment and Re-employment Rights Act*:

  The U.S. Department of Labor's Veterans' Employment and Training Service provides the *Nontechnical Resource Guide to the Uniformed Services Employment and Re-employment Rights Act* to enhance the public's access to information on applying USERRA in various circumstances. The guide is available from the Department of Labor's website at www.dol.gov/vets/whatsnew/uguide.pdf.

Chapter 23

Ensuring Workplace Safety

You must provide a safe working environment for all of your employees. Employees who can concentrate on their jobs without constant fear of injury will be more productive and less inclined to complain to the California Division of Occupational Safety and Health, better known as Cal/OSHA.

Federal and state laws require you to reasonably protect your employees from work-related illness and injuries and workplace violence.

In this chapter, you will find answers to questions about the following topics:

- Creating a written safety program
- Preventing injuries
- Workplace violence
- Cal/OSHA inspections
- Ergonomics
- Heat illness

Creating a Workplace Safety Plan

Title 8 of the California Administrative Code contains the regulations that California employers must follow. The specific regulations you must follow depend on your business or industry. The Occupational Safety and Health Standards board wrote the Title 8 regulations. Cal/OSHA enforces the Title 8 regulations.

You can obtain copies of the specific standards from Cal/OSHA.

Minimum Workplace Safety Requirements

All employers must establish an overall plan — an Injury and Illness Prevention Program (IIPP) — to keep the workforce free from work-related injuries and illnesses. Individual standards require more detailed plans, such as an Emergency Action Plan, that describe how you will help your employees stay safe on the job.

Know which safety standards apply to your organization and communicate these standards to your employees. Understanding the safety standards is essential to avoid Cal/OSHA fines and to preserve the safety of your employees and workplace.

Take the following steps to create your safety plan:

- Hang your ***California and Federal Employment Notices Poster***, which contains the required Cal/OSHA posting. For more information, see “Posters” in Chapter 2, page 5.
- Maintain an Injury and Illness Prevention Program. Make sure your employees know about the workplace safety practices the plan covers. For more information, see “Injury and Illness Prevention Program (IIPP)” on page 600.

- Maintain an Emergency Action Plan. For more information, see "Emergency Action Plan" on page 602.
- Maintain a Fire Prevention Plan. For more information, see "Fire Prevention Plan" on page 603.
- Maintain a Hazard Communication Program (HAZCOM). For more information, see "Hazard Communication Program (HAZCOM)" on page 605.
- If one or more of your employees experienced two repetitive motion injuries (RMIs) in a 12-month period, you must create an ergonomics plan. For more information, see "Repetitive Motion Injuries (Ergonomics)" on page 607.
- Ensure that your premises and equipment comply with the Work Surfaces, Control Devices and Emergency Equipment standards. For more information, see "Work Surfaces, Control Devices and Emergency Equipment" on page 604.
- Create a program to train supervisors and employees on risks, identification, prevention and treatment of heat illness. For more information, see "Avoiding Heat Illness" on page 623.

Depending on your industry and the hazards associated with your business, you may need many more written compliance programs. You must identify the additional standards applicable to your workplace.

Even if your organization is exempt from complying with part or all of a standard, consider establishing a plan or program for handling potentially dangerous situations. You can add this information to your employee handbook or safety manual.

Injury and Illness Prevention Program (IIPP)

Every company in California must create an effective Injury and Illness Prevention Program (IIPP), which contains a general plan to keep the workforce free from work-related injuries and illnesses. All employers must produce a written IIPP.[1]

If an insured organization has an experience modification factor of 2.0 or greater, the workers' compensation insurer must review the organization's IIPP within six months of the initial policy term.[2] The experience modification rate is an adjustment that an insurer makes to the workers' compensation insurance premium of organizations that meet or exceed a certain size. Insurers assign an experience modification factor to each insured company. The experience modification factor is based on organization size.

IIPP Exemptions

Some employers have different written record keeping requirements. You may be exempt from some of the written record keeping requirements if you are an establishment:

- With fewer than 20 employees during the calendar year, in an industry that is not on the designated high hazard list and you have a Workers' Compensation Experience Modification Rate (ExMod) of 1.1 percent or less
- With fewer than 20 employees during the calendar year and on a designated list of low hazard industries

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[1] 8 CCR sec. 3203

[2] Lab. Code sec. 6401.7(l)

If you fall into one of these two categories, you can limit written documentation of the IIPP to the following information:

- The identity of the people with authority and responsibility for program implementation, as required by Title 8 of the California Code of Regulations, sec. 3203 (a)(1)
- Scheduled periodic inspections to identify unsafe conditions and work practices, as required by Title 8 of the California Code of Regulations, sec. 3203 (a)(4)
- Training and instruction provided to employees, as required by Title 8 of the California Code of Regulations, sec. 3203 (a)(7)

Local government entities are not required to keep records of the steps they take to implement and maintain their IIPPs. Local government entities include:

- Counties, cities and, districts
- Public or quasi-public corporations
- Public agencies
- Any public entity, other than a state agency, that is a member of or created by a joint powers agreement

Creating a Written IIPP

You can use the *Injury and Illness Prevention Program for Non-High Hazard Employers* to help you get started. Your written plan must specify:

- Management's approval of the plan
- The people responsible for implementing the plan
- A company safety policy statement
- A system to identify workplace hazards
- A plan for periodic scheduled inspections (You can choose the frequency, depending on how hazardous your work environment is. Cover the Emergency Action Plan as part of your periodic IIPP inspections.)
- A plan for correcting unsafe or unhealthy conditions
- A plan for investigating injuries
- A plan for safety training
- How you will communicate with employees about safety
- The record keeping and posting requirements and any exceptions to them[3]

Injury and Illness Prevention Program for Non-High Hazard Employers

If you employ fewer than 10 employees, you can:

- Communicate to and instruct employees orally about safe work practices.
- Choose to maintain records of inspections only until the hazards identified are corrected.

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[3] 8 CCR sec. 3203

- Document training by maintaining an instruction log that you provide to a new employee or to an employee reassigned to new duties.

Seasonal employers can use a model program designed specifically for seasonal employers, available at www.dir.ca.gov/dosh/dosh_publications/iipintermit.html. Additional IIPP requirements apply to specific industries, such as the construction and petroleum industries.

Training Requirements for IIPP

Training is required when you:

- Implement your IIPP
- Assign a new employee to a position
- Transfer an existing employee to a new position
- Make changes to workplace conditions

Provide refresher training as necessary. You can use the *Initial Safety Training Certificate*, the *Training Sign-In Sheet* and *Training Sign-In Sheet - Spanish* forms to document training sessions.

Initial Safety Training Certificate

Training Sign-In Sheet

Training Sign-In Sheet - Spanish

Recordkeeping and Recording

Any injury that requires medical treatment beyond first aid and all occupational illnesses must be investigated, recorded and reported. You can use the *Accident, Injury and Illness Investigation* form to help you document the incident.

Accident, Injury and Illness Investigation

In addition, see the recording and reporting requirements discussed in "Cal/OSHA Requirements and Inspections" on page 611.

Provide your employees a mechanism to anonymously report safety concerns. You can use the *Employee Safety Information* form, along with your IIPP.

Employee Safety Information

Emergency Action Plan

Every employer must maintain an Emergency Action Plan. The Emergency Action Plan standard requires you to maintain a plan for handling emergencies, including evacuating employees, providing emergency medical attention and reporting emergencies to employees and community agencies.[4]

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[4] 8 CCR sec. 3220

Creating a Written Emergency Action Plan

If you have more than 10 employees, you must create a written Emergency Action Plan. You can use the *Emergency Action Plan* form to help you document your program. Your plan must specify:

- The people responsible for implementing the plan or portions of the plan
- How to communicate emergencies to employees
- Fire and emergency evacuation policies
- The personnel assigned to provide first aid and emergency medical attention

Written Plan Exemption

You are exempt from the written plan requirement if you employ 10 or fewer employees. This does not relieve you from your obligation to have a plan for handling emergencies. However, the plan can be verbally communicated to employees.

Emergency Action Plan

Emergency Action Plan Training Requirements

Train employees when you establish or change your plan and when you hire new employees. Conduct emergency training and drills periodically. You can use the *Initial Safety Training Certificate*, *Training Sign-In Sheet* and *Training Sign-In Sheet - Spanish* forms to document training sessions.

Initial Safety Training Certificate

Training Sign-In Sheet

Training Sign-In Sheet - Spanish

Recordkeeping and Reporting Requirements

Recordkeeping is required for your IIPP, and you must follow the IIPP requirements in case of an incident.

Fire Prevention Plan

The Fire Prevention Plan standard requires you to be aware of the fire hazards that your employees face and to maintain a plan for handling fires. Every employer must maintain a Fire Prevention Plan. Organizations with more than 10 employees must maintain the Fire Prevention Plan in writing.[5]

Creating a Written Fire Prevention Plan

If you have more than 10 employees, you must create a written Fire Prevention Plan. You can use the *Fire Prevention Plan* form to help you document your program. Your plan must specify:

- The people responsible for implementing the fire prevention program
- Known fire hazards in the area
- Your fire prevention practices
- The fire control measures you put in place, for example, sprinkler systems

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[5] 8 CCR sec. 3221

- The frequencies of inspection and maintenance of fire control devices (Use the *Fire Prevention Checklist* to help you determine what and when you should inspect.)
- Alarm systems
- Special employee responsibilities

Fire Prevention Plan

Fire Prevention Checklist

Employers with 10 or fewer employees can communicate the plan verbally and do not need to maintain a written fire prevention plan.

Fire Prevention Training

Train employees on fire prevention and safe work practices, either as part of your IIPP training or as a separate fire prevention program. You can use the *Initial Safety Training Certificate, Training Sign-In Sheet* and *Training Sign-In Sheet - Spanish* forms to document training sessions.

Initial Safety Training Certificate

Training Sign-In Sheet

Training Sign-In Sheet - Spanish

Fire Prevention Plan Recordkeeping and Recording

Record employee training in fire prevention. Document periodic inspections and fire protection equipment maintenance.

Work Surfaces, Control Devices and Emergency Equipment

The Work Surfaces, Control Devices and Emergency Equipment standards cover employee-occupied areas and set minimum safety limits for lighting, flooring, housekeeping, entrances and exits.

Complying With the Work Surfaces, Control Devices and Emergency Equipment Standards

Every employer must comply with the Work Surfaces, Control Devices and Emergency Equipment Standards.

Use the *Safety Inspection for Work Spaces and Surfaces Checklist* to help you comply. Include general information on potential hazards in your written IIPP.

Inspections are not required. Most situations are covered by IIPP inspections. Record employee training and document any inspections.

Safety Inspection for Work Spaces and Surfaces Checklist

Training Requirements

Training is required if engineered controls, such as guard rails, are used. Include the training as part of your IIPP training.

Hazard Communication Program (HAZCOM)

The Hazard Communication Program (HAZCOM) standard requires all employers to communicate workplace hazards to employees, particularly when employees handle or may be exposed to hazardous substances during normal work or foreseeable emergencies.[6]

Every employer —regardless of size — with employees who may be exposed to hazardous substances must comply with HAZCOM. There are a few limited exemptions and exclusions. For example, hazardous wastes regulated by the EPA are excluded from the hazard communication regulation.

Every organization must comply with HAZCOM. There are a few limited exemptions and exclusions. For example, hazardous wastes regulated by the EPA are excluded from the hazard communication regulation. See the Guide to the California Hazard Communication Regulation at http://www.dir.ca.gov/dosh/dosh_publications/hazcom.pdf.

Under HAZCOM regulations, employers were required to provide training on new labels and safety data sheets by December 1, 2013. This training is required in response to Cal/OSHA's adoption of new federal hazard communication regulations.[7]

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) made revisions to federal HAZCOM rules to help with the implementation of a global system for classification and labeling of chemicals. The international community decided that uniform regulations are necessary to ensure improvement of quality and consistency of information provided to employers and employees regarding chemical hazards and associated protective measures.

California's Division of Occupational Safety and Health, better known as Cal/OSHA, reviewed the revised federal regulations and made modifications to the California standard.

Cal/OSHA modified and adopted:

- Revised criteria for classifying chemical hazards
- Revised labeling provisions that include requirements for use of standardized signal words, pictograms, hazard statements and precautionary statements
- A specified format for safety data sheets (previously referred to as "Material Safety Data Sheets")
- Revisions related to definitions of terms used in the standard
- Requirements for employee training on labels and safety data sheets

A state review committee determined that certain California regulations are more effective than the federal standard, and those were retained. Cal/OSHA's revised HAZCOM standard can be found on the Department of Industrial relations website at www.dir.ca.gov/title8/5194.html.

In 2014, additional supplemental regulations on the Hazard Communication Standard became effective. This rulemaking addressed many more items. There are revisions to the construction asbestos hazard communication, training, and safety data sheets, in addition to revisions to warning labels and signs warning of the effects on the lungs and for cancer. In addition, there are health hazard warnings relating to cadmium, lead hazards, chromium and methylenedianiline. Section 5194(c), Definitions, has also been revised extensively.

In addition to the above required HAZCOM communications, Proposition 65 requires that employers with 10 or more employees warn any person prior to their exposure to a chemical known by the California government to cause cancer, birth defects or other reproductive harm.

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[6] 8 CCR sec. 5194

[7] Title 8, California Code of Regulations section 5194

Creating a Written HAZCOM Program

Use the *Hazard Communication Program* form to help you document the program.

You must explain how you will meet requirements for labeling hazardous substances and other forms of warning that you will provide to employees.

You must obtain safety data sheets from manufacturers for all labeled containers and items on your inventory of hazardous substances. Your suppliers must provide the safety data sheets.

Safety data sheets contain information provided by a product's manufacturer that describes the product's chemical properties, potential hazards and instruction in safe handling. Inspections are optional as long as you properly maintain all standard documents, such as safety data sheets, labels and warnings.

All labels must have pictograms, a signal word, hazard and precautionary statements, the product identifier and supplier identification. Labels cannot be removed or defaced. A pictogram "quickcard" is currently available from OSHA.

Hazard Communication Program

HAZCOM Training Requirements

Train all new employees. Provide refresher training when you receive new information on hazards and standards. New training is required whenever a new chemical hazard is introduced into the employees' work area.

In addition, employers are required to provide training regarding new label elements and safety data sheet formats that are a result of revisions to federal and state HAZCOM regulations. See OSHA's website for label contents and pictograms necessary for the training, as well as answers to frequently asked questions regarding the training.

This OSHA fact sheet also has information on the minimum required topics for the training.

Further, employers should provide Proposition 65 warnings in the training. You can use the *Initial Safety Training Certificate*, *Individual Safety Training Certificate*, *Training Sign-In Sheet* and *Training Sign-In Sheet - Spanish* forms to document training sessions.

Initial Safety Training Certificate

Individual Safety Training Certificate

Training Sign-In Sheet

Training Sign-In Sheet - Spanish

HAZCOM Recording and Reporting

You must develop and maintain an inventory of all hazardous substances. Ensure that hazardous substances in the workplace have safety data sheets. You must document employee training and compliance with the standard.

Repetitive Motion Injuries (Ergonomics)

The Repetitive Motion Injuries (RMI) standard, commonly referred to as the Ergonomics standard, requires employers to address workplace injuries that are caused by repetitive motion.[8] Repetitive motion hazards are a result of work tasks that require repeated actions, combined with the additional stress of improper ergonomics or workstation design.

All employers must do what they can to prevent RMIs.

The formal Ergonomics standard requirements apply only when:

- More than one employee suffers an RMI
- A licensed physician diagnoses the RMIs as musculoskeletal injuries
- The RMIs were predominantly caused by a repetitive job, process or operation
- The employees were performing a job, process or operation of identical work activity
- The reports of two RMIs occurred within 12 months of each other

Creating a Written Ergonomics Plan

While a written procedure can assist you in properly implementing the standard, there is no requirement for a written plan. You can use the *Office and Commercial Establishment Safety Including Ergonomics and Office Chemical Safety* as a guide. Your written program should describe:

- How the standard applies
- Step-by-step instructions for compliance with the Ergonomics standard
- Any interim actions to prevent RMIs
- How to verify the diagnosis of an RMI
- How to conduct worksite evaluations (You must evaluate a representative number of jobs, processes or operations for proper ergonomic design. You must determine if they involve certain motions, positions or other bodily movements that are hazardous to muscles and joints.)
- How to implement RMI hazard controls

Ergonomics Training

You must provide initial training. However, refresher training is not required. The standard specifies training program content and implementation. The *Office and Commercial Establishment Safety Including Ergonomics and Office Chemical Safety* form includes examples of the required training elements.

Ergonomics Recordkeeping and Reporting

You must keep records of all worksite evaluations conducted, control measures taken, training provided and Cal/OSHA Log 300 reporting completed. For more information on Cal/OSHA recording and reporting, see "Recording Work-Related Injuries and Illnesses" on page 613.

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[8] 8 CCR sec. 5110

Heat Illness Prevention Plans

Employers with outdoor workplaces must prepare an emergency heat illness plan and train workers on steps to take if someone develops heat illness. For more information, see "Avoiding Heat Illness" on page 623.

Providing Personal Protective Equipment

Standards governing the use of chemicals in the workplace or the use of certain types of machinery may require you to provide personal protective equipment (PPE) to protect your employees in certain circumstances, such as:

- **Emergency Action:** You must comply with blood borne pathogens exposure regulations and exposure prevention requirements for any employee who provides emergency first aid and provide any other equipment that employees need to handle emergencies.
- **Fire Prevention:** No PPE is required, but standard fire protection equipment, such as fire extinguishers, sprinkler systems and alarms, is required.
- **Work Surfaces, Control Devices and Emergency Equipment standards:** Not unless another standard also applies, such as standards pertaining to working with chemicals, projectiles or machinery.
- **HAZCOM:** Not unless another standard also applies, such as standards pertaining to working with chemicals, projectiles or machinery.
- **Ergonomics:** Only as a supplement to engineering controls and administrative controls. Engineering controls include workstation redesign and adjustable fixtures. Administrative controls include job rotation and work pacing.

Other circumstances involve providing PPE such as gloves, masks, lead aprons, hard hats and keyboard wrist rests for your employees to help prevent injuries and illnesses. Take the following steps to determine what your employees need to work safely.

1. Evaluate your workplace for the need for PPE. Consider all of the jobs, processes and operations employees will perform, both day-to-day and in an emergency. The following list provides examples of evaluation questions:
   - Do your employees handle, or are they exposed to, chemicals or blood borne pathogens?
   - Do your employees perform tasks that require repeating the same bodily motions?
   - Do your employees work in areas with falling items, flying projectiles or heavy machinery?
   - Do your employees lift heavy or cumbersome objects?
   - Do your employees work in areas that require forceful exertion to perform tasks?
2. Document the situations that require your employees to use PPE. Identify what PPE items you will supply.
3. Provide and maintain PPE for all employees exposed to hazards.
4. Perform periodic inspections.
   - Make sure that PPE is in good working order and is readily accessible.
   - Verify that employees use PPE properly and consistently.

You cannot charge employees for the use and cost of PPE.

Health Care Workers

The Hospital Patient and Health Care Worker Injury Protection Act requires employers to adopt a patient protection and health care worker back and musculoskeletal injury prevention plan. The plan must include a safe patient handling policy reflected in professional occupational safety guidelines for the protection of patients and health care workers in health care facilities.[9]

Amusement Ride Safety

The Division of Occupational Safety and Health (DOSH) regulates the safe installation, repair, maintenance, use, operation and inspection of all amusement rides for the public's protection. The Permanent Amusement Ride Safety Inspection Program prohibits operating permanent amusement rides without at least $1 million of insurance per occurrence insuring the owner or operator against liability for injury or death.

Amusement ride operators must report to the DOSH immediately by telephone on each known incident where the maintenance, operation or use of the ride results in death or injury that requires medical treatment beyond first aid. The law also requires a report for incidents that result in loss of consciousness that requires medical treatment beyond first aid, major mechanical failure or a patron falling from a moving or temporarily stopped ride in an elevated position. The law also requires a written accident report submitted to the DOSH on a form designated by the DOSH within 24 hours of the incident. The DOSH also possesses inspection authority of the rides.

The Amusement Rides Safety Law requires each amusement ride owner to provide training to its employees for safe ride operation and maintenance. The amusement ride owner must maintain all records necessary to demonstrate that the training requirements have been met. These records must be made available to a DOSH inspector upon request.

The DOSH may issue civil penalties if it determines that the ride's owner or operator willfully or intentionally violated the law and that violation results in death or serious injury. The DOSH is required to enforce the Permanent Amusement Ride Safety Inspection Program by issuing citations and notices of civil penalty. Owners and operators can appeal to the Occupational Safety and Health Appeals Board (OSHAB).

Any amusement ride owner or operator who fails to comply with any provision of the Amusement Rides Safety Law or any related rule, regulation or safety order is guilty of a misdemeanor.

Other Standards to Consider

Other specific Cal/OSHA standards may apply to your organization, especially if you work in a designated high hazard industry. For additional information on high hazard industries, visit the Department of Industrial Relations (DIR) Model IIPP website at www.dir.ca.gov/dosh/dosh_publications/iiphihzemp.pdf.

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[9] Lab. Code sec. 6403.5

Why You Must Maintain These Plans

If you don't maintain required safety plans, Cal/OSHA can cite you for violating the applicable standard.

Documenting your plans for compliance shows that you intend to comply with the standards. If you do receive a citation, your documentation demonstrating your intentions can help reduce the penalties.

Sharing the information in these standards with your employees also helps you provide the knowledge they need to avoid potential dangers and how to handle such situations. For example, let them know the best escape route in case of a fire, where you store the first aid kit, what health dangers they might be exposed to and how they can communicate their safety concerns to you.

Creating a Written Program

When you create a written program, either for your IIPP or to comply with any other standard, base it on processes and policies you implement for your organization.

Researching and Preparing Your Program

Before writing your program, gather as much information as you can about your current workplace conditions and practices. Identify potential problems. Conduct a comprehensive health and safety survey of your facility, including equipment, tools and chemicals. Look at your accident and injury data.

Gather any existing documents you created that can help you fill in the information. These documents can include the following:

- A fire escape plan
- Local emergency contact information
- Safety Data Sheets
- Workplace violence policies

Find out if Cal/OSHA considers your organization to be in a high hazard industry. For general guidelines on high hazard employers, visit the Cal/OSHA Model IIPP website at www.dir.ca.gov/dosh/dosh_publications/iiphihzemp.pdf.

Find out if Cal/OSHA considers your workplace to be at-risk for workplace violence. For workplace violence guidelines, visit the DIR's Workplace Security website at www.dir.ca.gov/dosh/dosh_publications/worksecurity.html.

Identify the processes or policies that your organization lacks. Determine any other processes or policies you must implement.

Review Cal/OSHA standards applicable to your type of operation. Specific standards apply to some operations, such as the construction industry.

Create two levels of information: general and detailed. Document the general information in your IIPP and your employee handbook. Document the detailed information in the individual safety plans you develop to address the specific standards with which you may be required to comply.

Compiling the Written Program

Use the *Injury and Illness Prevention Program for Non-High Hazard Employers* to create your IIPP and to determine the information you must supply. Your IIPP need not cover every detail. The IIPP constitutes only an outline of your entire compliance plan.

Use the detailed information that you collected in your research phase to complete the written programs for all other standards. Consider adding text to your employee handbook or safety manual for standards that do not require written programs.

Injury and Illness Prevention Program for Non-High Hazard Employers

Maintaining the Written Program

The easiest way to help your organization avoid violations, injuries and legal claims is to keep your compliance information up-to-date and to communicate changes to your employees. Schedule a quarterly, semi-annual or annual review, depending on the nature of your business.

Cal/OSHA Requirements and Inspections

Safety in the workplace is a very serious topic. You're up against inspections, citations and compliance schedules. Although there is an appeals process, maintaining a safe workplace is your best defense.

The federal Occupational Safety and Health Administration (federal OSHA) implemented changes to recordkeeping and reporting criteria, effective January 1, 2015. For the most part, Cal/OSHA's standards are already more stringent than the new federal standard. Differences, however, may exist. Federal OSHA has given states that operate their own safety and health programs, such as California, extra time to implement the new requirements. At the time of publication, Cal/OSHA had not provided additional information. For more information, check Cal/OSHA's website at www.dir.ca.gov/dosh/dosh1.html.

Reporting Serious Injury or Death

All employers, regardless of size, must immediately report all incidents that result in any of the following:

- Death of an employee
- Hospitalization of an employee for more than 24 hours for treatment other than observation
- Loss or serious disfigurement of any body part[10]

You must immediately report a serious injury or death by telephone or email to the nearest Cal/OSHA District Office.[11] "Immediately" is defined as soon as practically possible, but not longer than eight hours after you know or should have known about the incident. If you can demonstrate that there were problematic circumstances, you can make the report no more than 24 hours after the incident. In addition to making the phone call or sending the email, it is advisable to fax a copy of the report to the Cal/OSHA District Office. Keep a copy that includes the date, time and fax number to which it was sent.

You must submit the incident reports in two situations:

- When an employee is seriously or fatally injured

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[10] Lab. Code sec. 6302(h); Lab. Code sec. 6409.1

[11] 8 CCR sec. 342

- When you receive an annual survey form from the Bureau of Labor Statistics or a specific request from Cal/OSHA

California law mandates a fine of $5,000 for employers who do not report a serious injury or death. Individual employees may be liable for up to one year in jail and/or a $15,000 fine. Corporations face fines up to $150,000.

Reportable Incident Procedures

When a reportable incident occurs:

1. Prepare an incident report, which includes all of the following information:
    - Incident time and date
    - Your name, address and telephone number
    - Name and job title or badge number of the person reporting the accident
    - Address of the incident site
    - Name of the person to contact at the incident site
    - For each injured employee:
        –Name and address
        –Nature of the injury
        –Location to which the injured employee was moved
    - Identity of other law enforcement agencies and personnel present at the incident site
    - A description of the incident
    - If the incident scene or equipment that caused the incident was altered
2. Submit this report to Cal/OSHA no later than eight hours after the incident occurs or eight hours after a death occurs, regardless of the time elapsed between the incident and the death.

To find the nearest Cal/OSHA district office:

- Look in the state government agencies section of your phone book
- Read the poster that you must display in your workplace (see Chapter 2, "Posting and Notice Requirements")
- Visit Cal/OSHA's website at www.dir.ca.gov/DOSH/DistrictOffices.htm

Whenever a state, county or local fire or police agency is called to an accident involving an employee in which a serious injury, illness or death occurs, the responding agency must telephone the nearest DOSH office.

You are not required to report incidents that:

- Occur on a commercial airplane, train or bus
- Occur in a motor vehicle accident on a public highway
- Involve a violation of the Penal Code

Agencies other than Cal/OSHA investigate the types of incidents listed above.

For information on recording workplace injuries that do not involve serious injury or death, see "Recording Work-Related Injuries and Illnesses" on page 613. For more information on reporting injuries as part of the workers' compensation process, see "What To Do When an Injury Occurs" in Chapter 25, page 683.

Recording Work-Related Injuries and Illnesses

Cal/OSHA requires employers to record and report work-related injuries and illnesses. Recording and reporting are two separate processes. You need not always perform both.

"Recording" involves creating and maintaining records of work-related injuries. Keep these documents as references. You will also need them if an inspection requires you to present your records.

The *Log 300* is used to record and classify work-related fatalities, injuries and illnesses, and to note the extent and severity of each case.

You are exempt from recording if you employ 10 or fewer employees or if your organization is classified in a specific, low hazard North American Industry Classification System (NAICS) category. Statistical agencies use the NAICS to classify business establishments by their primary activity for the purpose of collecting, analyzing and publishing statistical data related to the U.S. business economy. The NAICS was adopted in 1997 to replace the Standard Industrial Classification (SIC) system.

Use the Work-Related Injuries and Illnesses Log - Form 300 to record and classify work-related fatalities, injuries and illnesses, and to note the extent and severity of each case.

You must only record injuries or illnesses if they are work-related. Work-related injuries and illnesses can include incidents away from the workplace if the employee was elsewhere because of a work-related activity or while engaged in a work-related activity.

Injuries that occur while commuting to and from work are excluded. For more information, see "Injuries Caused by Employee Misconduct" in Chapter 25, page 671. However, an injury that occurs while an employee is traveling on company business is considered work-related, unless the employee is engaged in purely personal activities.

Reports must be submitted in two situations:

- When an employee is seriously or fatally injured (see "Reporting Serious Injury or Death" on page 611
- When you receive an annual survey from the Bureau of Labor Statistics or a specific request from Cal/OSHA

Recording the Incident

When a work-related injury or illness occurs, you must perform the following steps:

1. Record the incident on the *Injury and Illness Incident Report - Form 301*.
    - You must record the incident within seven calendar days of receiving information on it.
    - You must keep separate records for each establishment.
    - You must attribute the incident to the location where it occurred, even if the employee normally works at another location.

- You can omit the employee's name and insert the phrase "privacy case" if the injury involves an intimate body part or the reproductive system, an incidence of sexual assault, mental illness, infection with HIV, tuberculosis or hepatitis, sharps and needlestick injuries with contamination from potentially infectious material, and other injuries or illnesses, at the employee's request

Keep a separate log that identifies the employee by case number. You can use discretion when describing the nature of the injury. You must be able to produce this log, also known as a privacy case list, upon Cal/OSHA request.

2. Record a case number on the *Injury and Illness Incident Report - Form 301*.
3. Transfer the information from the *Injury and Illness Incident Report - Form 301* to the *Work-Related Injuries and Illnesses Log - Form 300*.
4. Update the *Form 301* and *Form 300* as the nature of the injury or illness and its consequences become known.

Cal/OSHA offers *Form 300*, *Form 301* and *Form 300A - Summary of Work-Related Injuries and Illnesses* in PDF. To download these forms, visit the Cal/OSHA website at www.dir.ca.gov/dosh/PubOrder.asp.

Cal/OSHA also created a Microsoft Excel workbook that contains *Form 300*, *Form 301* and *Form 300A*. The forms are linked, so the totals in *Form 300* are copied to *Form 300A*. You can use the workbook to record injuries and create yearly summaries. Download the workbook at www.dir.ca.gov/dosh/dosh_publications/CalOSHARecordkeepForms.xls.

Preparing the Annual Summary of Work-Related Injuries and Illnesses

You are required to prepare and post a *Summary of Work-Related Injuries and Illnesses - Form 300A* from February 1 to April 30 of the year following the year covered by the form. The *Form 300A* summarizes the work-related injuries and illnesses that occurred at your organization during a calendar year.

Form 300A must reflect the nature and consequences of events during the year as accurately as possible. The annual summary must be completed even if no work-related injuries or illnesses occurred during the year. If none occurred, simply enter "0."

For each establishment:

1. Prepare a separate *Summary of Work-Related Injuries and Illnesses - Form 300A*.
2. Make sure the annual summary is certified by one of the following people:
    - An owner
    - A corporate officer
    - The highest ranking person at the establishment
    - The immediate supervisor of the highest ranking person at the establishment
3. From February 1 to April 30 of the year following the one to which the *Form 300A* applies, post the *Form 300A* in a conspicuous place where you normally post employee posters. The *Form 300A* cannot be altered, defaced or covered by other material. If you have employees on the payroll during the posting period, but they do not report at least weekly to the posting location, you must give or mail a copy of the *Form 300A* to them.

Maintaining Your Work-Related Injury and Illness Records

You must keep the following records for five years after the end of the year that the records cover:

- *Work-Related Injuries and Illnesses Log - Form 300*
- The privacy case list, if one was created for that year
- *Injury and Illness Incident Report - Form 301*
- *Summary of Work-Related Injuries and Illnesses - Form 300A*

During this five-year period, you must update the *Form 300* to include any newly discovered recordable injuries or illnesses. You must also show any changes in classification for previously recorded events. You are not required to update *Work-Related Injuries and Illnesses Summary - Form 300A* or the individual *Injury and Illness Incident Report - Form 301* reports.

If you sell your business, you are responsible only for the period during which you owned the business. You must transfer all records to the new owner. The new owner must save the records. However, the new owner is not required to update or correct them, unless they pertain to current employees for whom events were previously recorded.

Accessing Work-Related Injury and Illness Records

Employees, former employees and their properly authorized personal representatives are entitled to a copy of all of the following:

- The individual's incident report(s)
- *Work-Related Injuries and Illnesses Log - Form 300*, with names of employees deleted for privacy cases
- Current or archived annual summaries

You must provide these copies by the end of the next business day after the request. An authorized employee representative, such as a collective bargaining agent, is entitled to a copy of the *Work-Related Injuries and Illnesses Log - Form 300* for the establishment it represents. You must provide the copy to the requesting party within seven calendar days of the request. You must remove the following information from the delivered copy:

- Name
- Address
- Date of birth
- Date of hire
- Sex
- Physician's name
- Treatment location
- If treated in an emergency room
- If hospitalized overnight

Before disclosing *Work-Related Injuries and Illnesses Log - Form 300* or *Injury and Illness Incident Report - Form 301* reports in response to any other request, you must delete all personal identifying information unless you provide the information for the following purposes:

- To a consultant you hire to evaluate your safety and health program

- To process workers' compensation or other insurance benefits
- To public health or law enforcement agencies, except where notification and opportunity to object under Health Insurance Portability and Accountability Act (HIPAA) privacy standards apply

Providing Safety Training

Training is an effective way to keep employees informed of your policies and procedures. The regulations do not specify the type of training or the frequency. Initial and ongoing training is an important component of your workers' compensation cost containment efforts. Training is also mandated by most Cal/OSHA standards.

Effective training is critical, particularly for new employees. Some industries estimate that new employees account for 30 percent of all injuries. Immediately correct poor work habits or unsafe behavior.

The Construction Safety Orders and the General Industry Safety Orders contain instruction and training requirements. These requirements are summarized in the "Safety and Health Training and Instruction Requirements," available at www.dir.ca.gov/dosh/dosh_publications/TrainingReq.pdf.

Training Sign-In Sheet

Training Sign-In Sheet - Spanish

Determine the Training You Need

Determine which standards require you to train your employees. Note that even when a standard doesn't require training, the IIPP often does.

Make a list of the subjects to determine if you can combine subjects to cover multiple standards. Use this list as a foundation for selecting your method of training.

Determine Who Will Provide and Receive the Training

Designate an internal or external resource who is qualified to provide training, based on the standards and requirements.

Provide training to all new employees. Provide training to existing employees who transfer or are promoted to new positions. You must also provide training to independent contractors.

Determine When to Provide the Training

In addition to new employee training, provide training after an incident. Provide training when a process changes, such as when you install new equipment or move to a new site. You can also choose to provide refresher training annually.

Determine How to Provide the Training

You can choose the method you use to provide training. The training method depends on how complex the training must be, the number of employees you must train and your budget. Supervisors may need separate training.

Always document the training that employees receive to show your compliance with the IIPP and to prove that you are serious about ensuring workplace safety.

Note for Health Clubs

Under current law, health clubs must acquire an automatic external defibrillator (AED) and meet specific training and maintenance standards.

When a health club employee uses an AED, the owners, supervisors, employees and other responsible authorities are not liable for civil damages that result from rendering the emergency care or treatment. However, if the health club allows its members access to its facilities during operating hours when employees who are trained to use AEDs are not on the premises, the health club can be held liable for civil damages as a result of the absence of trained staff. For facilities larger than 6,000 square feet, members must be denied access to the facility if a trained employee is not on the premises.[12]

Create an Ongoing Safety Campaign

To meet your IIPP's requirements, conduct an ongoing campaign to remind employees of the importance of workplace safety. The campaign might include the following:

- Periodic safety training
- Regular safety meetings
- Safety newsletters
- Safety contests, for which several vendors provide creative ideas and accompanying rewards

Documenting training and training-related activities provides evidence in support of your IIPP. A campaign also builds team awareness and peer pressure to support safety standards. Top management must support injury prevention programs. Ensure that all employees know about these programs.

Line supervisors should be held accountable for the incidents of job-related injuries, just as they are held accountable for production and quality objectives. Their performance evaluations should consider their work unit's safety performance. Supervisors should display a solid understanding of regular workplace inspections, hazard recognition, accident investigation, employee relations, motivational techniques, cost of accidents, and safety rules and procedures.

Establish a safety committee that consists of top management, line supervisors and production personnel. The safety committee discusses accidents, solutions, hazards and their corrections. The safety committee determines and focuses on priorities. Management should make every effort to implement the solutions the committee offers. In addition, adopt an incentive program to motivate all employees to improve safety performance.

Perform Self-Inspections

Perform your own inspections of your site, equipment, safety practices and safety documents.

- Internal inspections present the best defense against and preparation for inspections by outside agencies.
- Many OSHA standards require you to document periodic inspections for compliance.
- During an inspection, you can identify a potential hazard, find a broken guardrail or determine that your employees need refresher safety training.
- Inspections keep you familiar with your site, processes and operations so you can evaluate the efficiency and productivity of your workplace.

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[12] Health and Safety Code sec. 104113

Periodic Self-Inspection Requirements

When Does Cal/OSHA Perform Inspections?

Cal/OSHA's inspection program targets workplaces where there is a likelihood of health and safety hazards and/or violations of standards. Due to constitutional limitations on government searches and seizures, the agency must have reasonable cause to conduct an inspection. However, courts have granted Cal/OSHA broad discretion in determining reasonable cause. Cal/OSHA inspects a workplace when:

- An employer reports a fatality or serious injury or illness
- An employee complains
- Issuing a permit requires a follow-up inspection
- Cal/OSHA's general administrative plan calls for inspections for a certain type of employer
- An industry has been selected as part of the Targeted Inspection and Consultation Program (TICP)

The Targeted Inspection and Consultation Program (TICP), is a Cal/OSHA program that identifies certain high hazard employers and requires them to pay a fee to fund a special inspection unit.

The targeted group shifts periodically based on injury and illness statistics for that industrial classification.

What Should You Do to Prepare for a Cal/OSHA Inspection?

Develop policies for handling an inspection. Designate key personnel to participate. Train personnel in the procedures to follow. Advise them on handling potential issues that may emerge as the inspection progresses. Your policy can be formal or informal. However, it should cover the key phases of an inspection. For resources that can help you develop procedures, see "Further Information" on page 656.

Cal/OSHA Training Requirements

What Is the Cal/OSHA Inspection Process?

Cal/OSHA inspections follow a process governed by the Labor Code and the *Cal/OSHA Policy and Procedure Manual:*

1. Initial contact — Typically, you do not receive advance notice of the inspection. Cal/OSHA makes three exceptions and will provide advance notice in the following situations:
    - When an apparent imminent hazard requires prompt correction by the employer
    - To ensure availability of essential personnel or access to the site, equipment or process, or when it has to be conducted after hours

- When the Cal/OSHA chief or his/her designee decides that advance notice would make a more thorough inspection possible

2. Opening conference — The Cal/OSHA inspector presents credentials and states the reasons for the inspection to someone with the authority to grant consent to the inspection. You can ask to postpone the inspection, but only for a good reason, such as:
    - All essential personnel are not available
    - The inspector's credentials or the stated reason for the inspection lack credibility

Inspectors hold sufficient authority to obtain search warrants if you refuse the inspection.

3. Document request — The inspector usually requests the following documents to review:
    - Your written IIPP
    - Your experience modification rate from your insurer, if applicable
    - *Work-Related Injuries and Illnesses Log - Form 300*, *Work-Related Injuries and Illnesses Summary - Form 300A* and *Injury and Illness Incident Report - Form 301* for the current year and for the five previous years
    - Permits, registrations and any variances from Title 8 Safety Orders
    - Any written programs that are required by a standard that regulates your business
    - Codes of safe practice at a construction site

Work-Related Injuries and Illnesses Log - Form 300

Work-Related Injuries and Illnesses Summary - Form 300A

Injury and Illness Incident Report - Form 301

4. Walk-through — Inspectors conduct a walk-through of the premises, accompanied by key personnel from your organization.

    The inspection may be a partial inspection, limited to the area defined by the stated reasons for the inspection. The inspection may be a comprehensive inspection of your entire workplace.

    Typically, you should restrict the inspector's access to the areas specifically designated for inspection.

    During a comprehensive inspection, the inspector may stop to examine machinery, interview employees and observe working situations. Your personnel accompanying the inspector may be asked to explain or answer questions about the work process.

5. Exit and closing conferences — When the inspection concludes, the inspector:
    - Summarizes the results.
    - Makes pertinent observations.
    - Discusses findings and conclusions.
    - Requests information, documents or additional inspections.

If the Cal/OSHA inspector does not issue any citations, the exit conference ends and nothing else follows. If the inspection results in a citation or other action, such as a Special Order, Cal/OSHA schedules a formal closing conference approximately one month after the citation is issued.

What Happens if the Inspector Finds a Violation?

If the inspector finds a violation:

- You could receive a citation with civil penalties. The penalties are based on the violation's severity, extent, likelihood and the size of your business:
  - Nonserious or minor violations — up to $7,000.
  - Repeat or willful violations — from $5,000 to $70,000.
  - Serious violations — up to $25,000.
  - Failure to correct or abate a violation — up to $15,000 for each day the failure continues.
  - Substantial if you fail to report a fatal or serious incident.
- You could receive a Special Order to force you to remedy any unsafe condition, device or other workplace hazard to employee safety and health that is not covered by any existing standard. A Special Order creates a special standard that may apply only to you.
- You could receive a Notice if the violation relates to a general or regulatory offense and does not immediately impact employee safety and health.
- You could receive an Information Memorandum to direct your attention to a workplace condition that has the potential of becoming a hazard to employee safety or health.
- You may receive an Order to Take Special Action when an unsafe workplace condition that is covered by an existing standard requires specific instruction.
- You may receive an Order Prohibiting Use or Yellow Tagging when the inspector finds any workplace condition, equipment or practice that constitutes an imminent hazard to employees. An imminent hazard is any condition or practice that could reasonably be expected to cause death or serious physical harm immediately or before the hazard can be eliminated through normal enforcement procedures.

If the inspector finds a violation, you must:

- Post the citation, order or notice of violation in a place where employees working nearby can easily read it.
- Correct or abate the problem within the specified amount of time and notify Cal/OSHA.

Review the citation or order for accuracy. Read its statement of the violated standard's requirements. Record your observations of the inspection and your understanding of the inspector's findings. If you object to the citation and possess enough evidence, you can appeal. For more information, see "What Happens if You Disagree With the Results of an Inspection?" on page 621.

Serious Violations

The California Labor Code establishes procedures and standards for an investigation of a serious violation in the workplace.

There is a rebuttable presumption that a serious violation exists if Cal/OSHA determines that there is a "realistic possibility that death or serious physical harm could result from the actual hazard created by the violation."[13] The violation's existence is presumed to be true, unless you can prove otherwise.

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[13] Lab. Code sec. 6432

An actual hazard may include:

- A serious exposure exceeding an established permissible exposure limit
- The existence of one or more unsafe or unhealthy practices, means, methods, operations or processes

Before issuing a citation, Cal/OSHA must make a reasonable attempt to determine all of the following information:

- Training for employees and supervisors relevant to preventing employee exposure to the hazard
- Procedures for discovering, controlling access to and correcting the hazard
- Supervision of employees who are exposed to the hazard
- Procedures for communicating to employees about your health and safety rules and programs
- Information that you want to provide before a citation is issued, including;
  - Your explanation of the circumstances surrounding the alleged violation
  - Why you believe a serious violation does not exist
  - Why you believe your actions were reasonable and responsible
  - Any other information that you want to provide

The Labor Code also contains specific steps and timelines for issuing a citation. You can rebut the presumption that a violation is serious. You must demonstrate that you took all of the steps that a reasonable and responsible employer in like circumstances should be expected to take before the violation occurred to anticipate and prevent the violation. You must demonstrate that you took effective action to eliminate employee exposure to the hazard as soon as the violation was discovered.

“Serious physical harm” is defined as any injury or illness that occurs in the place of employment or in connection with any employment, that results in any of the following outcomes:[14]

- Inpatient hospitalization for purposes other than medical observation
- The loss of any member of the body
- Any serious degree of permanent disfigurement
- Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job
- Impairment might include second- or third-degree burns, crushing injuries, respiratory illnesses or broken bones

What Happens if You Disagree With the Results of an Inspection?

If you disagree with the results of an inspection, you can appeal to the Occupational Safety and Health Appeals Board (OSHAB) within 15 working days of receiving a citation or order.

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[14] Lab. Code sec. 6432

1. Because the time allotted to appeal is only 15 working days, start the decision-making process immediately upon receiving the citation or order. Identify issues that you can appeal. Consider the following factors:
    - The size of the penalty and the cost and time allowed for abatement compared to the cost and time of appealing.
    - The potential for a repeat citation.
    - Your likelihood of success, given the strength of your defense.

2. Communicate your desire to appeal to the OSHAB by hand delivery, mail, fax or telephone. The OSHAB provides you with an appeal form and other information on the appeal process. If you return the form to the OSHAB within 10 working days, the appeal is considered complete when the OSHAB receives the following items:
    - A signed, completed appeal form
    - The statutory grounds on which the appeal is based
    - The reasons for the appeal
    - The issues to be raised

    After the appeal process begins, you may be required to wait up to six months for the OSHAB to assign a docket number for the appeal. When docketed, the OSHAB will send a copy of the form back to you with a docket number and OSHAB stamp affixed.

You must post a copy of the docketed appeal form at or near the site of the already posted citation. The posting must remain in place until the appeal hearing begins or the claim is settled.

3. Because notification of docketing can be a lengthy process, begin preparing your defense for the hearing while the incident, inspection and facts remain current and fresh in your mind. Hearings are typically held no more than six months from the appeal's docketing. To investigate Cal/OSHA's information, file a discovery letter with the agency. Send copies to the OSHAB and any other interested party. You can subpoena witnesses or physical evidence.

    You cannot communicate with the OSHAB unless all parties to the appeal receive notification. You can serve a document on another party by personal delivery, first-class mail, overnight delivery or fax. You can communicate by a declaration, a written statement or a letter of transmittal.

4. You can request an informal conference. This meeting consists of you, your representatives, Cal/OSHA's district manager and the inspector responsible for the citation. You can discuss any evidence in an attempt to resolve any disputes and avoid the need for an appeal.

    District managers must hold the conference no more than 10 working days after issuing a citation. If you already filed an appeal, the conference can occur any time up to the date of the hearing.

You must notify employees of the conference, its date and its location. Post this information near the already posted citation and a copy of the conference confirmation issued by Cal/OSHA.

At this stage, Cal/OSHA's district manager, based on new evidence or interpretation, can withdraw or amend citations, including the existence of the violations and proposed penalties.

5. If you don't reach a settlement, you will make your defense at an official hearing before an administrative law judge (ALJ).

At least 30 days prior to a hearing, the OSHAB will send the parties a notice of hearing, advising them of the location, date and time. A hearing is postponed only if an emergency arises, or if a party or witness has a pre-existing scheduling conflict. If either party fails to appear at the hearing, the OSHAB issues a notice that it intends to dismiss the issue. To reinstate the matter, the absent party must establish just cause within 10 days for the failure to appear.

You must notify employees of the pending hearing. Post this information near the already posted citation.

6. At the close of the hearing, all testimony and documentation are considered complete and submitted to the ALJ for decision. Within 30 days, the ALJ summarizes the evidence received, makes findings and files a proposed decision along with his/her reasons for making the decision.

   The OSHAB can confirm, adopt, modify or set aside the proposed decision. The OSHAB then sends copies of its decision to each party. If no one files a petition for consideration, the decision is final and cannot be reviewed by any court or agency.

7. Either party can take 30 days to file a petition for reconsideration. The petition must explain, specifically and in full detail, every issue the OSHAB must consider. Anything that is not raised in the petition is waived and cannot be re-examined. If the OSHAB does not act upon a petition within 45 days, it is considered denied. Upon reconsideration, the OSHAB can make another decision or let the original one stand. If no one requests a judicial review, the decision is final.

8. Any party that disagrees with a decision after reconsideration or the denial of a petition must apply to the superior court for a writ of mandate within 30 days of the OSHAB's decision or denial.

Avoiding Heat Illness

Exposure to conditions of extreme heat and high humidity can subject employees to physical conditions that can range from uncomfortable to life-threatening. This section describes those conditions and the environmental and personal factors that create risk to employees. All California outdoor workplaces are subject to the heat illness standard. Other places of outdoor employment are subject to both the standard and special high-heat procedures.

Heat Illness Overview

The heat illness standard applies to all outdoor places of employment. The California Code of Regulations (CCR), Title 8, section 3395 (Heat Illness Prevention) contains the high-heat procedures and the heat illness standard.

New 2016

Cal/OSHA revised the heat illness standard; the new revised standard was effective on May 1, 2015.

Additional high-heat procedures apply to certain industries:

- Agriculture
- Construction
- Landscaping
- Oil and gas extraction and transportation
- Deliverers of agricultural products, construction materials or other heavy materials

Outdoor places include open spaces but can also include partial structures. For example, a shed with open sides can be an outdoor or an indoor workplace depending on the circumstances, according to Cal/OSHA. A partially open shed can be hotter than the outside environment due to the sun heating the shed and lack of air circulation.

California's heat illness prevention regulations require employers to:

- Provide ready access to plenty of free, cool, fresh, pure water (see "Providing Water" on page 625)
- Provide a shaded area for workers (see "Providing Shade" on page 625)
- Follow high heat procedures when temperatures reach 95 degrees or higher (see "Implementing High-Heat Procedures" on page 627)
- Implement emergency response procedures (see "Emergency Response Procedures" on page 629)
- Follow acclimatization procedures (see "Acclimatization" on page 630)
- Train workers about heat illness and how to prevent it (see "Training Employees" on page 630)
- Prepare a Heat Illness Prevention Plan and train workers on steps to take if someone gets sick (see "Training Employees" on page 630 and "Documenting Heat Illness Prevention Procedures" on page 632)

You can comply with the regulations by including a Heat Illness Prevention Plan in a written IIPP or by maintaining it in a separate document.

The revised heat illness regulations significantly change the obligations of employers with outdoor places of employment. Employers with outdoor workplaces will need to review their compliance obligations.

Cal/OSHA created a chart to address the changes and provide guidance on the new requirements:

Heat Illness Prevention Regulation Amendments Guidance

The heat illness standard provides the following definitions:

- "Acclimatization" means the body's temporary adaptation to work in the heat that occurs gradually when a person is exposed to it. Acclimatization peaks in most people within 4 to 14 days of regular work for at least two hours per day in the heat.
- "Heat illness" means a serious medical condition that results from the body's inability to cope with a particular heat load. Heat illness includes heat cramps, heat exhaustion, heat syncope and heat stroke.
- "Environmental risk factors for heat illness" means working conditions that create the possibility that heat illness could occur. Environmental risk factors for heat illness include air temperature, relative humidity, radiant heat from the sun and other sources, conductive heat sources, air movement, workload severity and duration, protective clothing and PPE that employees wear.
- "Personal risk factors for heat illness" means factors that affect the body's water retention or other physiological responses to heat. Personal risk factors for heat illness include a person's age, degree of acclimatization, health, water consumption, alcohol consumption, caffeine consumption and use of prescription medications.
- "Shade" means blockage of direct sunlight. One indicator that blockage is sufficient is when objects do not cast a shadow in the area of blocked sunlight. Shade is not adequate when heat in

the area of shade defeats the purpose of shade, which is to allow the body to cool. For example, a car sitting in the sun does not provide acceptable shade to a person inside it, unless the car is running with air-conditioning. You can provide shade by any natural or artificial means that does not expose employees to unsafe or unhealthy conditions and that does not deter or discourage access to use.

- "Temperature" means the dry bulb temperature in degrees Fahrenheit obtainable by using a thermometer to measure the outdoor temperature in an area where there is no shade. Though the temperature measurement must be taken in an area with full sunlight, the bulb or sensor of the thermometer should be shielded while taking the measurement (e.g., with the hand or some other object from direct contact by sunlight).

Providing Water

New 2016

This standard was revised, effective May 1, 2015.

You must provide employees with free, ready access to fresh, pure, suitably cool, potable drinking water. The water must meet the requirements set forth in the California Code of Regulations, Title 8 Section 1524 (Water Supply), Section 3363 (Water Supply) and Section 3457 (Field Sanitation), as applicable.[15]

Cal/OSHA's guidance states that the water must be fit to drink and free from odors that would discourage workers from drinking the water. Containers provided to employees must be clean and a source of potable water (e.g. a municipal water source) must be readily available. Water provided from non-approved, non-tested water sources (e.g. untested wells) is, according to the guidance, unacceptable. During hot weather, Cal/OSHA states that water must be "cooler than the ambient temperature."

The revised regulations provide that the water must be located as close as practicable to the areas where employees are working. Pursuant to the guidance, Cal/OSHA states that during any inspection, the inspector may ask the supervisor to describe factors that the employer considered when deciding where to place the water. Cal/OSHA also states that when employees are working across large areas, water should be placed in multiple locations. For instance, on a multi-level construction site, water would be placed on every floor in a safe, accessible location. According to the guidance, placing water only in designated shade areas or where toilet facilities are located is not sufficient.

If the work area does not contain plumbing to continuously provide suitable drinking water, you must provide a sufficient quantity of water. At the beginning of the work shift, you must provide water — a sufficient amount for each employee to drink one quart for each hour of the shift. You can begin the shift with smaller quantities of water if you have an effective procedure for replenishing the water during the shift. Employees must be allowed to drink one quart of water or more per hour. You must encourage employees to drink water frequently.

Providing Shade

New 2016

This standard was revised, effective May 1, 2015.

Shade must be present when the temperature exceeds 80 degrees Fahrenheit.[16]

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[15] 8 CCR sec. 3395(c)

[16] 8 CCR sec. 3395(d)

The trigger temperature for shade being present has been reduced by the revised heat illness regulations from 85 degrees to 80 degrees. Cal/OSHA recommends that employers monitor predicted weather temperatures in advance to know when the temperature will probably exceed 80 degrees.

You must provide and maintain one or more shaded areas at all times while employees are present. These shaded areas must be open to the air or ventilated or cooled by other safe means.

The definition of shade was amended to add a requirement that any shade provided by the employer must "not deter or discourage use." According to Cal/OSHA guidance, this means that workers should not encounter obstacles, hazards or unreasonably unpleasant conditions while moving toward the shade or resting in the shade.

Examples from Cal/OSHA:

- Employees should not have to cross traffic to reach the shade
- Shade should not be located next to portable toilets
- Shade should not be located where employees would sit on wet/muddy ground or come into contact with branches, brush and thorns.

The amount of shade must be enough to accommodate the number of employees on recovery or rest periods and those taking onsite meal breaks (the prior standard stated that the shade must accommodate at least 25 percent of the employees on the shift at anytime). According to Cal/OSHA guidance, employers can rotate breaks and meal periods. Employers must still comply with the requirements relating to timing of meal and rest periods. For more information, see "Meal and Rest Breaks" in Chapter 12, page 316.

Employers may not require or pressure employees to eat lunch in their own vehicles or go off-site to eat.

Employees must be able to sit in a normal posture fully in the shade without physically touching other employees. The shade must be located as close as possible to the areas where employees are working.

When the outdoor temperature in the work area does not exceed 80 degrees Fahrenheit, you must either provide shade as described in the preceding paragraph or provide timely access to shade upon an employee's request.

Except for employers in the agricultural industry, cooling measures other than shade (e.g., use of misting machines) may be provided in lieu of shade if the employer can demonstrate that these measures are at least as effective as shade in allowing employees to cool.

Preventative Cool-Down Rest

Employees must be allowed and encouraged to take a preventative cool-down rest in the shade when they feel the need to do so to protect themselves from overheating.[17] Such access to shade must be permitted at all times. A similar requirement was already in place, but the new standard places more conditions as to when workers may take these cool-down rests.

A worker who takes a preventative cool down rest:

- Must be monitored and asked if he/she is experiencing heat illness symptoms;
- Must be encouraged to remain in the shade; and

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[17] 8 CCR sec. 3395(d)(3)

- Must not be ordered back to work until any sign or symptoms have abated, **but in no event less than five minutes in addition to the time needed to access the shade**.

The revised standard contains a monitoring provision. Cal/OSHA guidelines state that the employee should be asked during the cool-down rest if he/she is experiencing any symptoms of heat illness, including simple fatigue. If any signs or symptoms of heat illness are observed or reported the employer cannot order the employee back to work and must "continuously observe" the employee until the signs or symptoms have abated.

If an employee exhibits signs or reports symptoms of heat illness during the rest, the employer is required to provide first aid or emergency response.[18]

According to Cal/OSHA's guidance, first aid should be initiated without delay, since early symptoms can rapidly progress to more serious illness. If heat illness is suspected, employers should immediately contact emergency medical personnel.

There is no limitation under the regulations for how often a preventative cool-down rest can be taken. The regulations do not specify any grounds for denying an employee the right to take such a preventative cool-down rest. Cal/OSHA states that employees should not be rushed and water should be available.

In addition, under the Labor Code, the laws that provide that an employer cannot require an employee to work during a meal or rest period also prohibit an employer from requiring employees to work during any "recovery period mandated by law or regulation or order from Cal/OSHA.[19]

Under the Labor Code, a "recovery period" is defined as a "cooldown period afforded an employee to prevent heat illness." Recent legislation clarified that recovery periods must be counted as hours worked and are paid periods for which there cannot be any deduction from wages.

An employer who requires an employee to work during a recovery period must pay one hour of premium pay for each day that the recovery period is not provided. For more information on the premium pay requirements, see "Premium Pay for Break Violations" on page 327.

Because the preventative cool-down rest can be taken on an "as-needed" basis, there are compliance challenges for employers. Unlike meal and rest breaks, there are no set time periods for when these breaks must be provided. Instead, the employee decides when the cool-down rest is needed to protect him/herself from overheating, and, if needed, the preventative cool-down rests must be provided throughout the day.

There are also requirements for "preventative cool down rest periods" which are a separate set of requirements that apply to high-heat procedures for employers in the agricultural industry. For more information, see "Implementing High-Heat Procedures" on page 627.

Implementing High-Heat Procedures

Employers in specified industries must implement high-heat procedures when the temperature equals or exceeds 95 degrees Fahrenheit.[20]

The industries subject to the high heat procedures include:

- Agriculture

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[18] 8 CCR sec. 3395(d)(4)

[19] Lab. Code sec. 226.7

[20] 8 CCR sec. 3395(a)(2)

- Construction
- Landscaping
- Oil and gas extraction, and
- Transportation and delivery of agricultural products, construction materials or other heavy materials, except for employees who are operating an air-conditioned vehicle and not performing loading or unloading duties

New 2016

The revised standard places new obligations on covered employers during periods of high-heat. The revisions are effective May 1, 2015.

These high heat procedures must include the following, to the extent practicable:

1. Ensuring that effective communication by voice, observation or electronic means is maintained so that employees at the worksite can contact a supervisor when necessary. An electronic device, such as a cell phone or text messaging device, may be used for this purpose only if reception in the area is reliable.

2. Observing employees for alertness and signs or symptoms of heat illness. Under the revised standard, employers are required to ensure effective employee observation and monitoring of signs or symptoms of heat illness. According to the guidelines, whichever method is used the employer must be able to ascertain the condition of employees at regular intervals. Under the regulations, the employer must implement one or more of the following:
    - Direct observation of 20 or fewer employees by a supervisor/designee
    - Mandatory buddy system
    - Regular communication with employees working alone
    - Other effective means of observation

3. Designating one or more employees on each worksite as authorized to call for emergency medical services, and allowing other employees to call for emergency services when no designated employee is available.

4. Reminding employees throughout the work shift to drink plenty of water.

5. Holding pre-shift meetings before work begins to review high heat procedures, encourage employees to drink plenty of water and remind employees of their right to take a cool-down rest when necessary. This is a new obligation for covered employers. According to the guidance, the meetings are meant to briefly remind supervisors and employees of the high-heat procedures and not meant to review every element covered in the training. Topics to be covered include staying hydrated, taking cool-down rests, identifying employees who should call for emergency medical services, and how employees will be observed.

    Review the *Heat Illness Prevention Regulation Amendments Guidance* for more information on the revised standard relating to high heat procedures.

Heat Illness Prevention Regulation Amendments Guidance

Agriculture Employers

ew 2016

The high-heat procedures have been modified for agricultural employers. For employees employed in the agriculture industry, when temperatures reach 95 degrees or above, the employer must ensure that the employee takes a minimum 10-minute preventative cool-down rest period every two hours.[21]

The regulations and Cal/OSHA guidance provide as follows:

- The preventative cool-down rest period required by this regulation may be provided concurrently with any other meal or rest period required by IWC Wage Order No. 14 thus resulting in no additional preventative cool-down rest period required in an eight hour workday. In other words, during the first eight hours of a shift, the cool-down periods may be provided at the same time as the rest periods already required.
- If the workday will extend beyond eight hours then an additional preventative cool-down rest period will be required at the conclusion of the eighth hour.
- If the workday extends beyond ten hours, then another preventative cool-down rest period will be required at the conclusion of the tenth hour, and so on. Preventative cool-down rest period has the same meaning as "recovery period" in Labor Code section 226.7.
- The regulations specifically use the word "ensure." According to the guidance, merely offering the opportunity for a break is not enough. Employers must ensure that employees actually take the required cool-down rest periods.
- Employers are required to provide the additional breaks as soon as temperatures reach or exceed 95 degrees. For instance, if the temperature hits 95 degrees in the last half hour of an 8 hour shift and the shift will last more than eight hours, the employer must ensure the employees take cool-down rest periods starting at the end of the eighth hour of work.

While records of these rest periods are not mandated, Cal/OSHA considers recordkeeping a best practice.

Emergency Response Procedures

ew 2016

The revised standard contains more detailed requirements regarding emergency response procedures.[22] In the past, emergency response procedures were required only as an element of training. Under the revisions, employers are required to implement effective emergency response procedures, including:

- Ensuring effective communication — by voice, observation or electronic means — so that employees can contact a supervisor or emergency medical services when necessary. Electronic devices (such as cell phones) can only be used if reception in the area is reliable. If an electronic device does not provide reliable communication (for instance, cell phone coverage is inadequate), the employer must make sure there is a means of summoning emergency medical services.
- Responding to signs and symptoms of possible heat illness, including first aid measures and how emergency medical services will be provided.
- Implementing procedures for contacting emergency responders and, if necessary, transporting employees to a place where they can be reached by a medical provider. The guidance states that procedures must include immediate steps to keep a stricken employee cool and comfortable once emergency service responders have been called.

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[21] 8 CCR sec. 3395 (e)(6)

[22] 8 CCR sec. 3395(f)

- Ensuring that clear and precise directions to the work site are available to be provided to emergency providers when needed. For instance, the guidance states that mobile crews must be provided with a map of their location or detailed directions that can be given to emergency responders.

Additional employer obligations apply when signs or symptoms of heat illness appear:

- If a supervisor observes, or an employee reports, signs or symptoms of heat illness, the supervisor must take immediate action commensurate with the severity of the illness.
- If the signs and symptoms are indicators of severe heat illness (such as decreased consciousness, staggering, vomiting, disorientation, irrational behavior or convulsions), the employer must implement emergency response procedures.
- Any workers who display or report any signs or symptoms of heat illness must not be left alone or sent home without being offered on-site first aid or emergency medical services.

The guidance states that employers are not required to provide medical personnel on site and supervisors and employees are not expected to have medical expertise.

Establishing emergency response procedures at non-fixed, remote and hard to access worksites is especially important.

Acclimatization

Acclimatization is a process by which the body adjusts to increased hot exposure. The body needs to adapt when working in hotter environments. According to Cal/OSHA guidance, employees are more likely to develop heat illness if they don't take it easy when a heat wave strikes or when starting a job that newly exposes them to heat. Most people are usually acclimated within four to 14 days of regular work involving at least two hours per day in the heat.

Under the prior standard, acclimatization procedures were part of the high heat standard applying to specified industries.

New 2016 The revised standard, however, sets new acclimatization procedures that apply to **all** outdoor places of employment.[23]

All employees must be closely observed by a supervisor during a "heat wave" — defined as any day in which the "predicted" high temperature will be at least 80 degrees and at least ten degrees higher than the average high daily temperature in the preceding five days.

Employers are also required to be extra vigilant with new employees — close observation by a supervisor or designee is required for the first 14 days of employment.

Cal/OSHA guidance indicates that best practices include finding ways to lessen the intensity of work during heat waves and during the first two weeks of employment.

Training Employees

You must provide employee training before an employee or supervisor begins outdoor work. All employees must be trained on the policies and procedures that you have established in order to comply with the heat illness standard.[24]

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[23] 8 CCR sec. 3395(g)

[24] 8 CCR sec.3395(h)

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Training requirements were expanded on May 1, 2015, when the revised heat illness standard became effective.

You must provide effective training in the following topics to all supervisory and non-supervisory employees:

- The environmental and personal risk factors for heat illness, as well as the added burden of heat load on the body caused by exertion, clothing, and personal protective equipment.
- The employer's procedures for complying with the requirements of this standard, including but not limited to:
  - The employer's responsibility to provide water, shade, cool-down rests and access to first aid.
  - The employee's right to exercise his/her rights under the heat illness standard without retaliation.
- The importance of frequent consumption of small quantities of water, up to four cups per hour, when the work environment is hot and employees are likely to be sweating more than usual in the performance of their duties.
- The concept, importance and methods of acclimatization, pursuant to the employer's procedures as set forth in its Heat Illness Prevention Plan.
- The different types of heat illness, the common signs and symptoms of heat illness, and appropriate first aid and/or emergency responses to the different types of heat illness. In addition, training should cover the fact that heat illness may progress quickly from mild symptoms and signs to a serious and life threatening illness.
- The importance to employees of immediately reporting to the employer, directly or through the employee's supervisor, symptoms or signs of heat illness in themselves or in co-workers.
- The employer's procedures for responding to signs or symptoms of possible heat illness, including how emergency medical services will be provided should they become necessary.
- The employer's procedures for contacting emergency medical services, and if necessary, for transporting employees to a point where they can be reached by an emergency medical service provider.
- The employer's procedures for ensuring that, in the event of an emergency, clear and precise directions to the worksite can and will be provided as needed to emergency responders. These procedures must include designating a person to be available to ensure that emergency procedures are invoked when appropriate.

Training must be effective. According to the guidance, training must be understood by employees, which includes providing training in a language the employees understand. Inspectors will look for indicators that the employer has made a good faith effort to communicate all the essential information to employees.

Cal/OSHA will examine both the training content and how it is presented. The test for compliance, according to Cal/OSHA is:

- Whether training has occurred;
- Whether the required content has been provided; and
- Whether the training has been effective in communicating the essentials to employees.

Work procedures should be consistent with the information provided in the training.

Cal/OSHA guidance states that training should occur at the time of hire with refresher training as needed. It is best to provide refresher training as the hot season approaches.

Supervisor Training

Prior to being assigned to supervise employees working in the heat, supervisors must be trained on the following topics:

- The information required to be provided to employees as listed in "Training Employees" on page 630.
- The procedures the supervisor is to follow to implement the applicable provisions of the standard.
- The procedures the supervisor is to follow when an employee exhibits signs or reports symptoms consistent with possible heat illness, including emergency response procedures.
- How to monitor weather reports and how to respond to hot weather advisories.

Documenting Heat Illness Prevention Procedures

New 2016

You must establish, implement and maintain a written Heat Illness Prevention Plan. The plan can be included as part of your Illness and injury Prevention Program.[25]

The plan, at a minimum, must contain the following:

- Procedures for provision of water, as described in Providing Water (see "Providing Water" on page 625)
- Procedures for providing access to shade, as described in Providing Shade (see "Providing Shade" on page 625)
- High-heat procedures, as described in Implementing High-Heat Procedures (see "Implementing High-Heat Procedures" on page 627)
- Emergency response procedures, as described in Emergency Response Procedures (see "Emergency Response Procedures" on page 629)
- Acclimatization methods and procedures, as described in Acclimatization (see "Acclimatization" on page 630)

Employees and supervisors must be trained on these procedures so they can understand and implement the employer's plan. There are also specific training requirements (see "Training Employees" on page 630).

The written plan must be in both English and the language understood by the majority of employees. The plan must also be available at the worksite.

You must provide this documentation to the Division of Occupational Safety and Health (DOSH) upon request.

Heat Illness Prevention Plan - Outdoor Employees

Heat Illness Prevention Plan - Outdoor Employees - Spanish

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[25] 8 CCR sec. 3395(i)

Recognizing Conditions That Create Heat Illness

Employees' exposure to high air temperature and relative humidity, radiant heat from the sun and other heat sources cause medical conditions that lead to the stages of heat illness. Working conditions, including the workload, protective clothing and PPE, and limited movement of air also lead to stages of heat illness.

Prevention is key. Employees who wait to take steps, such as drinking water and accessing shade, until symptoms appear are at greater risk. Progression to serious illness can be rapid.

The following people bear a greater risk of heat illness than others:

- Adults over the age of 65
- People who are physically ill, particularly if they have heart disease and high blood pressure
- People who are overweight
- People who take certain medications, including common medications as antihistamines, blood pressure medications and diuretics

  These medications affect the body's ability to retain water and respond to heat. Tell physicians who provide industrial medical examinations for companies that employ outdoor workers if an employee is likely to be exposed to extreme heat. The physician can then provide proper counseling.

Recognizing Symptoms of Heat Illness

Heat illness occurs when the body's temperature control system cannot maintain an acceptable temperature. Under normal circumstances, the body cools itself by sweating. However, when high temperatures and high humidity prevent the body from releasing heat efficiently, a person's body temperature can rise quickly. This rapid temperature increase causes numerous medical symptoms. If left untreated, very high body temperatures might damage the brain and other vital organs and ultimately cause a person's death. You must train all employees who may be exposed to heat stress, as well as their supervisors, to recognize the four stages of heat illness.

Progression to serious illness can be rapid. Take all signs or symptoms seriously.

Heat Rash or Prickly Heat

Heat rash can be caused by excessive sweating during hot, humid weather. The rash appears as a red cluster of pimples or small blisters most likely found on the neck and upper chest, in the groin area, under the breasts and in elbow creases. The rash occurs when the body is exposed to hot and humid conditions, which substantially reduce the person's ability to sweat and decreases the employee's heat tolerance.

To treat heat rash, wash the affected area with soap and water and dry it thoroughly. Apply calamine lotion or powder to relieve discomfort. Avoid using creams or ointment; they keep the skin warm and moist and can aggravate the condition.

Heat Cramps

Cramps usually occur when an employee performs hard physical labor in a hot environment. Heat cramps usually affect the arm and leg muscles. They can also affect the stomach and back muscles.

Painful cramps occur intermittently after prolonged exposure to hot conditions. Typically, an electrolyte imbalance brought on by sweating causes heat cramps. Studies show that drinking commercially available carbohydrate-electrolyte replacement fluids, such as sports drinks, minimizes adverse effects during recovery.

To treat heat cramps:

- Interrupt all activity and move the employee to a cool environment.
- Increase intake of water, juice or a sports drink.
- Continue rest for several hours after the cramps subside.
- Seek medical attention if the cramps do not subside within one hour. This can be a symptom of heat exhaustion.

Heat Exhaustion

Heat exhaustion develops from exposure to high temperatures with inadequate or unbalanced fluid replacement. An employee usually displays the following warning signs of heat exhaustion:

- Heavy sweating with cool, moist skin
- Fast, but weak pulse rate
- Shallow, fast breathing
- Paleness
- Muscle cramps
- Weakness or tiredness
- Dizziness
- Headache
- Nausea or vomiting
- Fainting

To treat heat exhaustion:

- Drink cool, nonalcoholic, decaffeinated beverages.
- Rest in an air-conditioned or cooled environment.
- Take a cool, but not cold, shower or sponge bath.

Fortunately, heat exhaustion responds readily to prompt treatment. Heat exhaustion should not be dismissed lightly. The fainting associated with heat exhaustion can be dangerous. The victim could be operating machinery, controlling an operation that should not be left unattended or may be injured when he/she faints. The signs and symptoms seen in heat exhaustion are similar to those of heat stroke. Heat stroke is a medical emergency.

Heat Stroke

Heat stroke occurs when the body becomes unable to control its temperature. The employee's body temperature could rise quite rapidly, reaching 106 degrees Fahrenheit or higher within as little as 10 to 15 minutes. Heat stroke is a serious condition requiring urgent medical attention. If emergency treatment is not provided quickly, heat stroke can cause death or permanent disability. Warning signs of heat stroke include:

- High body temperature over 102 degrees Fahrenheit
- Red, hot and dry skin with no sweating
- Rapid, strong pulse
- Throbbing headache
- Dizziness
- Nausea
- Confusion
- Convulsions
- Decreased or loss of consciousness

If you see any of the warning signs of heat stroke, call 911 for medical assistance. At the same time, immediately take the following steps:

- Move the victim to a shady area.
- Help cool the victim's body: put ice packs in groin and underarms or soak clothing with cool water. Do not use cold water.
- If the humidity is low, wrap the victim in a cool wet sheet and place him/her in front of a fan to aid evaporation.
- Provide the victim with cool water, not with a beverage that contains caffeine or alcohol.
- Obtain medical assistance as soon as possible. If medical assistance will be delayed, contact a hospital emergency room for assistance.

Preventing Heat Stress

The following methods minimize the potential for and effects of heat stress:

- Provide an acclimatization period.

  According to Cal/OSHA, in most people, acclimatization peaks within four to 14 days of regular work for at least two hours per day in the heat.
- Provide engineering controls, such as air-conditioning and adequate ventilation.
- Provide administrative controls, such as work rotation, starting work early in the morning or starting work in the evening.
- Provide plenty of fluids to drink, especially water.
- Provide PPE, such as cooling vests and light-colored or reflective clothing.

Chapter 24

Violence in the Workplace

Violence, in the form of verbal threats, bullying and physical assault, is a significant problem in the workplace.

Employers would be wise to:

- Become informed of the risk factors and warning signs of potential violence
- Conduct an assessment to determine your organization's violence vulnerability
- Recognize the environmental factors that allow violence to escalate
- Develop an in-house anti-violence program

Current research suggests that employers' attempts to eliminate workplace violence are much more successful when the focus is on prevention rather than reaction. For that reason, it makes sense for employers to familiarize themselves with the early indicators that an employee might be at risk for violent acting out.

However, paying attention to the individual most likely to act out is not, in and of itself, enough. Employers would also be wise to create work environments in which it is difficult for hostile and aggressive behavior to take root.

Acknowledgments

CalChamber would like to thank Dennis A. Davis for his contribution to the Violence in the Workplace chapter.

Dennis A. Davis, Ph.D., is recognized nationally as an expert on workplace violence prevention, workplace bullying, conflict resolution, sexual harassment and cultural diversity.

Since 2008, Dennis has served as Ogletree Deakins' National Director of Client Training. In that capacity, he develops and implements training programs which are designed to minimize the risks associated with inappropriate employee behavior.

Dennis spent more than 10 years consulting to federal, state and local law enforcement agencies, where he used his education in clinical psychology to teach willful compliance techniques.

Reducing the Risk of Workplace Violence

According to the Bureau of Labor Statistics, incidents of workplace violence resulted in 383 fatalities across the United States in 2013. In California, 43 workplace violence homicides occurred. The statistics are even more concerning for women. Roughly 40 percent of all women who die at work die as a result of homicide. In fact, homicide is the leading cause of death for women on the job.

In addition to lives altered and lost, there is a major financial impact on corporate America as a result of workplace violence. According to a report published by the Department of Justice in 2011:

- Approximately 2 million incidents of workplace violence are reported annually
- 500,000 employees lose 1,751,000 days of work per year as a result of workplace assaults
- The lost days from work cost employee victims of violence $55 million dollars in lost wages

Some of the costs incurred by corporations in the aftermath of workplace violence include the following:

- Security
- Building repair and clean up
- Business interruptions
- Loss of productivity
- Lost employee time
- Employee turnover
- Increased workers' compensation claims
- Increased medical claims
- Litigation expenses

Understanding the risk factors and warning signs of increased potential for violence can reduce the number and severity of violent incidents in the workplace.

Although there is no specific profile of a "violent person," research indicates that certain behaviors are suggestive of an individual who is having coping problems. In most organizations, first-level supervisors are in a prime position to see changes and escalations in employee behavior.

After the proper people in your organization know the warning signs, they must know what to do about them. Too often, people allow inappropriate behaviors to go unaddressed, often because they don't know what to do. Studies suggest that inappropriate behavior often escalates when unaddressed.

A complete workplace violence initiative includes intervention and prevention methods. Your goal must be to prevent workplace violence and lessen the severity of the incidents that do occur.

California Laws About Workplace Violence

No single law governs how all organizations should address the issue of workplace violence. However, an increasing amount of legislation is enacted to protect against violence in certain highly charged and vulnerable workplaces. California laws might play a role in how your organization prepares for or responds to acts of violence in the workplace.

Temporary Restraining Orders

Any employer whose employee has suffered unlawful violence or a credible threat of violence from any person that has been carried out or that can reasonably be construed to be carried out at the workplace can seek a temporary restraining order (TRO) and an injunction against the perpetrator on the employee's behalf.[1] A TRO can also be sought on behalf of other employees at the employer's workplaces, at the discretion of the court.

Any chief administrative officer of a private postsecondary educational institution can seek a TRO on behalf of a student who has been subject to violence and/or a credible threat of violence with the student's written permission. The chief officer's designee can also seek a TRO on the student's behalf. A designee could be another officer, employee or student.[2] For more information, see "Obtain Temporary Restraining Orders" on page 654.

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[1] Code of Civil Procedure sec. 527.8(a)

Workers' Compensation and Workplace Violence

The Workers' Compensation Appeals Board (WCAB) determines whether to grant or deny a workers' compensation claim. If a third party injures or kills an employee during the course of his/her employment, the WCAB may determine that the employee was injured or killed solely because of the third party's beliefs about the employee's perceived race, religious creed, color, national origin, age, gender, disability, sex or sexual orientation. This determination does not mean that a personal relationship or connection exists between the employee and the third party.[3]

Understand the Warning Signs and Risk Factors for Workplace Violence

Imagine this scene: The lead story on the evening news discusses a man who walked into his place of employment and started shooting, injuring several employees and killing one. Media representatives fan out into the perpetrator's neighborhood to do a background story on this man. Neighbors describe him as "a regular guy" as they express their shock. They figure he must have just "snapped."

This is a very common myth. Studies suggest a completely different picture — people who perpetrate the most violent acts often demonstrate one or more of the following behaviors:

- Changes in mental functioning
- Substance abuse
- Sub-par performance
- Dehumanizing others and other forms of verbal abuse
- Disregard for policies and procedures
- Low tolerance for change
- Poor peer relationships
- Fascination with weapons
- Unusual (obsessive) focus on violent incidents
- Blaming others
- Bullying, aggression and hostility at work

Changes in Mental Functioning

Often, employees who are escalating toward violence demonstrate significant, even severe, changes in psychological functioning. These changes can include depression, agitation, disorientation and expressions of desperation. Often, co-workers detect a drastic change in interactive style on the part of a troubled employee. The once bright and positive individual begins to express pessimism and despair for example.

Substance Abuse

There is a .84 correlation between substance abuse and violence.[4] An overwhelming majority of perpetrators of violence are believed to abuse substances, according to the Department of Justice, and

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[2] Code of Civil Procedure sec. 527.85

[3] Lab. Code sec. 3600(c)

[4] *National Crime Victimization Survey* and the *Census of Fatal Occupational Injuries*: U. S. Department of Justice, 2011

approximately one quarter of the people who have been looked at for workplace violence were reported to be actively under the influence when the incident occurred.

Sub-Par Performance

Very often, individuals who go on to perpetrate incidents of violence are poor performers who have had multiple disciplinary and/or counseling sessions. Sometimes the poor performance is related to insubordination and a refusal to follow instructions. Just as often, the poor performance is related to the employee being distracted by personal issues and allowing performance to take a back seat.

Dehumanizing Others and Other Forms of Verbal Abuse

Dehumanization is the act of rendering a human being as less than human. After a person has been dehumanized, he/she is seen as no different than an object. Then, he/she can be treated as an object. Name calling, gender slurs and racial slurs are common signs that a person dehumanizes other people. This behavior is prevalent among those who act out violently.

Disregard for Policies and Procedures

Violent individuals often behave as though the rules do not apply to them. It is not uncommon to see those with the highest propensity for violence abuse an organization's leave policy, regularly show up late for work, take overly long breaks or show insubordination to supervisors. Employers would be wise to pay attention to the individual who has repeatedly violated company policies and procedures.

Low Tolerance for Change

Imagine your organization issued a new — and very unpopular — policy. The majority of your employees express a little irritation. But one employee fumes for hours after the notice goes out. This behavior is commonly seen in violent individuals. Their reaction to events is often seen as an overreaction. They have a tendency to throw tantrums, might slam doors, throw things and clench their hands and teeth.

Poor Peer Relationships

The loner is often associated with an increased risk for violence. But how do you define "loner"? What is it that makes a loner more violent? A loner is not a shy or reserved individual. Shyness or a quiet personality does not, in and of itself, indicate an increased risk of violence. The loner behaves as though he/she believes that he/she is better or smarter than his/her peers. Very often, the loner will refuse to work on a team project, instead insisting to work on his/her own. This person rarely expresses any interest in participating in office luncheons or in any social gathering.

A person who displays poor peer relationships often shows poor reality testing: their sense of what's real and what's not real can be warped or skewed. Because they push everyone out of their lives, there is no one to challenge the loner's perceptions.

Fascination with Weapons

People who act out violently often demonstrate a fascination or unusual preoccupation with weapons. This fascination is often demonstrated by the incessant discussion of weapons and/or the damage that said weapons can cause. People who are fascinated with weapons often present as insecure. They are often perceived as people who are uncomfortable using words to express themselves.

Unusual Focus (Obsession) on Violent Incidents

In many instances, the individual who goes on to perpetrate violence has shown a deep fascination with prior incidents of violence. Sometimes, this deep fascination is displayed by constant searching for news articles on the incidents; searching for background information on the perpetrators of the incidents; collecting pictures and other accounts of the incidents from the media; and discussing the perpetrators in hero-like terms.

Blaming Others

A person who perpetrates severe violence often exhibits an unwillingness or inability to take responsibility for his/her actions. This individual often expresses a belief that others want to hurt him or her. Violent people often believe that they are being picked on. The violent person may blame others as a way to rationalize his/her inappropriate behavior. This blaming behavior may be a manifestation of their feelings of persecution.

Bullying, Aggression and Hostility at Work

In addition to recognizing the risk factors for violent acting out, employers should not underestimate the significance of workplace bullying or ignore the relationship between bullying and violence. Bullying includes the infliction of abusive, malicious and humiliating behavior upon another.

According to research, certain environmental conditions allow bullying, violence and even harassment to take hold in the workplace. What's more, when looking at the definitions of these behaviors side by side, certain themes (abusive, hostile and threatening) present themselves.

Consider the following definitions:

- Bullying; the repeated infliction of intentional, malicious, and abusive conduct which interferes with a person's ability to do his/her work and is substantial enough to cause physical and/or psychological harm and a reasonable person would find hostile or offensive.
- Harassment; the existence of an environment that is threatening, intimidating, hostile and offensive, based on one's membership in a protected class. For more information, see "Hostile Environment Harassment" in Chapter 27, page 795.
- Workplace violence; any act, or threat, of aggression, that threatens the safety, security, or well-being of an individual who is at work or on duty.

A frequently asked question is ... "Why/how does behavior escalate from bullying to harassment?" Bullying often takes the form of taunting, teasing and making another person the target of the joke. When the teasing and taunting revolves around one's protected class, it escalates to harassment.

Another frequently asked question is ... "Why/how does harassment escalate to violence?" A couple of scenarios may take place. For example, when the object of affection rejects the potentially violent individual, that rejection provides an excuse to become violent. Similarly, when the bullying target decides not to put up with the bullying (either by reporting the behavior or by acting aggressively toward the bully), the bully often sees violent acting out as a reasonable next step.

Teasing and taunting might be fun for some, but not for the recipient. The signs that the fun in your workplace has taken an inappropriate turn include:

- Non-reciprocity; employees take shots at another employee, but he/she is not participating in the "fun." It is one-way.
- Targeting; often, inappropriate behavior is targeted to one individual (or group). You will recognize this as "picked on" behavior (bullying), where there is one person that many of the other employees direct their aggressive behavior toward.
- Personal; the teasing is of a personal nature. Acceptable one-upmanship might include joking about one's favorite sports team versus another team. Unacceptable teasing often includes something personal about the targeted employee (his/her body type or hairstyle, for example).
- Bias; teasing takes place against a protected group.

Because abusive conduct can often lead to unlawful harassment, California law requires a component relating to abusive conduct in mandatory supervisor sexual harassment prevention training. For more information, see "'Abusive Conduct' Training" on page 646.

Minimizing bullying may assist in the minimization of harassment and violence in your workplace as well. How can you minimize the occurrence of bullying in your workplace?

- Do not focus solely on numbers. Instead, encourage employee engagement in the company's goals.
- Make sure that your employees recognize that there is regard for their safety and security.
- Institute a documenting and reporting process for your employees to follow if they believe that they are being bullied.
- Be careful that you do not reward only the strong, aggressive personality.
- Apply your policies consistently and fairly. Often, top performers are allowed to get away with overly aggressive behavior.
- Encourage interactions that are respectful.
- Train your leaders to avoid passive aggressive behaviors.
- Don't allow your employees to have fun at the expense of others (especially those perceived as weak. Even if hostile behaviors do not rise to the legal level of harassment, be sure to intervene early and stop personal attacks. If camaraderie or "fun" is at the expense of other employees, it can sometimes be cruel and inappropriate.
- Make sure supervisors pay attention to the formation of cliques or "in" groups. Wherever "in groups" exist, "out groups" also exist. These are groups made up of individuals who are perceived as unpopular and less valuable to the organization. Combat this by making sure that everyone in your organization realizes that their role is important and vital to the success of the organization.

In sum, it's difficult to establish a causal relationship between bullying and workplace violence. Rather, they often co-exist. In hindsight, it's often found that the individual who went on to become physically violent had, in the past, also been abusive and threatening.

Creating Violence Prevention Policies

The percentage of individuals who perpetrate major acts of violence is relatively small. However, the majority of severely violent incidents were initiated by individuals who showed one or more warning signs. At first glance, it is impossible to know which people who exhibit these behaviors will escalate to hands-on violence and which will not.

Don't allow violent behaviors to go unaddressed. At best, people who display these inappropriate behaviors must learn better ways to express their needs. At worst, these are dangerous individuals.

Research suggests that the existence of one or more of the warning signs discussed in this section is not a guarantee of workplace violence. Warning signs play an important role in recognizing perpetrators, but organizations can take several highly recommended steps to reduce the frequency and severity of violent incidents in the workplace.

Write a Violence Prevention Policy

Without an official, written workplace violence policy, an employee who behaves in an unacceptable manner, for example, aggressively venting frustration over a policy change, is not technically breaking any rule.

Additionally, studies suggest that the overwhelming majority of the population will acquiesce to expectations when those expectations are clearly stated and understood.

An effective workplace violence policy must state that the organization takes a proactive approach to violence, and that it will tolerate neither violent behavior nor any behavior that is known to have a high correlation to violent behavior, such as bullying and threats of violence. It is important for each employee to be made aware that it is his/her responsibility to report behavior (on the part of fellow employees, customers, visitors, etc.) that is inconsistent with the workplace violence prevention policy.

The policy must state that the organization's position is one of zero tolerance.

Any acts that breach the policy will be investigated and appropriate action will be taken. The best policies also list unacceptable behaviors. The policy must also state very clearly that policy breaches can lead to discipline, up to and including termination.

CalChamber's ***Employee Handbook Creator*** can help you easily create an employee handbook that contains this policy. Purchase at the CalChamber store at store.calchamber.com.

Policy To-Do List

- Use your policy to instruct your employees of your expectations. Often, employers use their policy only as a tool to support disciplinary action taken against the employee
- Conduct an "information campaign" to make sure that each employee is aware of the contents of your anti-violence policy. Your policy is most effective when publicized and is used to guide employee behavior
- Write (or re-edit) your policy to make sure that it is written in clear and concise language. Studies suggest 90 to 95 percent of the population will acquiesce to expectations when expectations are clear[5]
- Specifically address bullying in your policy, indicating to your employees that it is not to be tolerated and should be reported just as an act of violence would be reported
- Make sure everyone, including vendors, is familiar with your policy

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[5] FBI's National Center for the Analysis of Violent Crimes

- State that there is "zero tolerance" for violence (meaning each allegation will be investigated and dealt with appropriately)
- Prohibit weapons on premises, at functions and while conducting any company business
- Specifically mention that "... a threat of violence will be considered the same as, and dealt with in the same manner as, an act of violence ..."
- Require that supervisors document and report acts/threats of violence to human resources (even if the supervisor believes they have dealt with the issues sufficiently)

Create a Crisis Management Team

The crisis management team (CMT) oversees the company's workplace violence prevention initiative. Depending on company size, the team should consist of six to eight individuals. Their specific disciplines may vary, but it is suggested that HR, legal, security and labor relations (if applicable) be represented.

The CMT fills three main functions:

- Coaching supervisors/managers: CMT members act as the in-house experts on issues pertaining to violence. Most often, those who are promoted to first-level supervisors are promoted based on their technical proficiency, not necessarily their management experience. Often, this level of leadership hasn't dealt with the more difficult issues associated with leadership (such as a nonperforming or acting-out employee). CMT members provide coaching on how to safely deal with difficult employees.
- Tracking incidents: One of the most problematic realities in many companies is the lack of documentation of violent behavior. It's widely believed that violent individuals escalate to more severe behavior over time. Failure to document escalating behavior makes appropriate and timely intervention nearly impossible. The CMT is the clearinghouse for all reports of violence within the organization.
- Liaison to relevant resources: When an employee displays problematic behaviors, it's essential to intervene appropriately. Because of its interdisciplinary make-up, CMT members are uniquely positioned to understand more about the company's available resources than others within the organization. Whether it's an employee assistance program referral or a fitness for duty evaluation, the CMT acts as the in-house expert.

CMT To Do List

- Make sure supervisors know how to access the CMT
- Publicize the existence of your CMT. Employees need to know where to take their safety concerns
- The CMT should develop relationships with local law enforcement, as well as mental health professionals
- CMT members should regularly convene and discuss incidents and critique their own performance
- Supervisors should know that the CMT is a resource provided to them, that is not intended to usurp their authority
- Assess whether additional expertise (such as law-enforcement, medical or mental health experts) is needed. Outside expertise should be sought out on an as-needed basis. The most important point here is that the CMT should not isolate itself in a vacuum.

Launch an Information Campaign

If company leadership develops a violence prevention policy but buries it in a manual on a shelf, the policy serves little purpose to the organization or its employees. After you put together a comprehensive workplace violence prevention policy, you must launch an information campaign to ensure that everyone in your organization is aware of and clearly understands your policy.

The information campaign should also include forming a CMT. The CMT handles any reports of inappropriate behavior. Your employees must know that the CMT will respond to their concerns about fellow employees, visitors and vendors. Some effective methods used to announce a new or revised violence policy and introduce the CMT include:

- Organization-wide email messages announcing the policy and CMT
- Bulletin board notices
- Fliers inside pay envelopes
- Text messages
- Organization-wide voicemails
- Abbreviated messages on pay stubs referring employees to the full policy.

Make sure that the information campaign includes a mechanism to inform new and prospective employees about the policy and the CMT. Use one or more of the following methods to effectively distribute the information to new hires:

- Include the policy as part of an employment application
- Require new hires to read and sign off on the policy
- Teach violence awareness as part of new employee orientation

Implement First-Level Supervisor Training

More than mid- and upper-level supervisors, first-level supervisors interact with employees, customers and clients on a regular basis. They are uniquely positioned to notice potential threats of violence before the behavior escalates to dangerous levels. Your supervisors should receive training in the following areas:

- Early threat recognition

  All supervisors must be able to identify behaviors that have a high correlation to violent behavior and the people who display those behaviors. This ability comes only through training. Early threat recognition training must include commonly seen scenarios and detailed descriptions of behavioral cues to watch for. When supervisors receive training to identify overly aggressive behavior, they can effectively act as the eyes and ears of the organization.

- Reporting and documenting violent incidents

  Develop an incident report form. Train all supervisors on how to use it. Supervisors should immediately forward the form to the CMT, which formally launches an investigation. The form should be short and include spaces for reporting the following information:

  - Who: the victim(s) and the perpetrator(s)
  - What: the specific violent behaviors observed or reported, and what action was taken (if any)
  - When: date and time

- Where: the location of the incident, such as in a particular office or common area of building, on the grounds or away from organization premises but on organization business
- Why: historical problems, personal differences
- Witnesses: list others who may have observed the incident

Workplace Violence Incident Report Form

Workplace Violence Incident Report Form 1 - OSHA

Workplace Violence Incident Report Form 2 - OSHA

'Abusive Conduct' Training

For some time now, the state of California has required anti-harassment training for all supervisors working for an employer with 50 or more employees. This requirement is commonly referred to as "AB 1825 training." That training is required to take place every two years, and must be a minimum of at least two hours in length.

Since 2015, California law has also required that mandatory harassment prevention training include training on prevention of "abusive conduct," defined as "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests."

Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance.

This law does not mean that an employee can sue for abusive conduct in the workplace unless, of course, the conduct becomes discrimination or harassment against a protected class. The law merely requires training on prevention of abusive conduct.

For more information, see "Training on the Prevention of Abusive Conduct" in Chapter 27, page 792.

Ensure Visitor and Vendor Compliance with Violence Prevention Policies

A significant percentage of workplace violence originates from people who are not employed by the organization. Customers, clients, visitors and vendors all contribute to the national problem of workplace violence. Several effective tactics can reduce the number of aggressive, hostile and violent incidents on the part of customers, visitors and vendors:

- Signage. Posted signs can be very effective in communicating to those who enter your premises exactly how you expect them to conduct themselves.
- Visitor sign-in. People are much more likely to act out when they perceive that their actions will go unnoticed. By requiring all who enter your building to sign in, you say "We know who is in the building, and we are paying attention."
- Security guards. Security guards provide a deterrent to inappropriate behavior. They are one layer in your overall security program, which is designed to make your organization a less opportune target for violence and other inappropriate behavior.

You can require that contractors and vendors sign your equal employment opportunity policy. You should require contractors and vendors to read and sign your violence policy. Require vendors to agree to train their employees on workplace violence as well and monitor their employees' behavior. Your vendors should also agree to remove from your premises any of their employees that you have determined to be inappropriate in their behavior.

Case Study: Managing Workplace Conflict

Workplace conflict is a real and costly problem. To manage workplace conflict, you should perform the following steps:

- Deal with problems right away.

  Office conflicts erode productivity. They chip away at morale and can lead to legal liability. When conflict smolders, the savvy supervisor will catch it before it becomes something more serious.
- Learn the basics. Conflict resolution is a must-have skill. There are many books and classes for supervisors at every level. Every supervisor should know the fundamentals of conflict resolution:
  - How to recognize trouble brewing.
  - When to get involved.
  - When to hang back.
  - How to facilitate a resolution.
  - How to ease anxieties.
- Chart a course for the entire office. Make sure people know who they are supposed to talk to when a conflict arises. Everyone should know which door to knock on to have their problems resolved.
- Listen first. Take each of the warring factions aside separately and hear them out. Then sit all the parties down together so that they can hear each other in a neutral setting.
- Watch for the big problems. There's a difference between "I don't like you" and "I don't like your kind." If a conflict goes beyond ordinary conflict into more serious territory — harassment based on race or gender, for example — deal with it in all appropriate seriousness or face the consequences later.

Workplace Violence Inspection Checklist - OSHA

Workplace Violence Factors and Control Checklist - OSHA

Assessing Vulnerability

As noted previously, approximately 2 million American workers report being victims of workplace violence each year. This number accounts for only those incidents that are documented and reported; it's estimated that many more incidents go unreported and undocumented.

Although no industry or workplace is completely immune to incidents of violence, research suggests that certain industries are at an increased risk for violence. You must consider many relevant factors to determine if your organization is at an increased risk for workplace violence. Information from government sources can assist you in this assessment.

Factors such as industry, location, previous incidents of violence and the presence of cash on site should be a part of your assessment. According to the Bureau of Labor Statistics:

- Food establishments (restaurants, bars and fast-food businesses) are very vulnerable to workplace violence; 67 percent of employee deaths at these establishments are a result of workplace violence
- Of the individuals working in night-time retail who die on the job, 48 percent die as a result of workplace violence homicide

- Custodial health care and mental health facilities also have a high incident rate for workplace violence. In fact, 27 percent of these workers who die at work are victims of homicide
- Males represent 80 percent of the workplace homicide victims
- Roughly two thirds of workplace homicides were perpetrated by assailants with no known relationship to the victim

In addition, research suggests that individuals with an inclination to act out are more likely to do so when social and economic stressors are present in their lives.

When assessing risk, consider economic pressures such as layoffs, unemployment and other measures of financial difficulty.

Factors to Consider

An assessment of the risk of violence in the workplace should include research on prior violent events in that particular workplace and surrounding businesses and competitors. Contact local law enforcement authorities for more information on violence that occurs at or near your workplace. Reviewing personnel files can uncover a trend or pattern of an employee whose prior workplace conduct may indicate violent conduct in the future.

Another factor to consider is the spread of hours in which employees are in the workplace. For example, a would-be rapist is less likely to enter a downtown high rise during the day when the office is full of people than during the evening when a skeleton crew is on duty.

Also, pay attention to upcoming changes in your workplace. Although layoffs, terminations, demotions and disciplinary actions do not cause workplace violence, they are sometimes used as an excuse by the already-escalating employee to rationalize violence. Likewise, pay attention to the employee who fails to obtain an expected promotion or one who believes that his complaints and grievances did not receive a proper response, as these events are often used by violent individuals as fuel for their escalating hostility.

Be sure to recognize obsessive romantic interest in a co-worker that is not returned. Numerous incidents of violence were perpetrated by individuals who reported that they were frustrated in their attempts to initiate relationships.

Remember, these events in the lives of violent individuals do not cause violence. Rather, these events are more accurately described as sometimes coexisting with violence. Data suggests that for some people in our society, aggressive acting out is a part of how they behave. The coexisting event increases the person's perceived stress level. This increase in stress is often the triggering event or excuse that the individual uses to act out.

For help in assessing the risk of violence in a particular workplace, see the California Division of Occupational Safety and Health's Workplace Security Profile.

Workplace Violence Inspection Checklist - OSHA

Workplace Violence Factors and Control Checklist - OSHA

Preventing Workplace Violence

The steps you should take to prevent violence in the workplace depend on the risk factors present in your particular workplace.

Develop a Violence Prevention Program

Every employer must create an Injury and Illness Prevention Program (IIPP). The IIPP requires you to communicate with employees about workplace hazards, establish procedures to identify and correct these hazards and provide employee training whenever you are made aware of a new or previously unrecognized hazard. Depending on the risk factors in a particular workplace, the law can require an IIPP to address workplace violence. For more information on IIPPs, see "Injury and Illness Prevention Program (IIPP)" in Chapter 23, page 600.

The federal Occupational Health and Safety Administration (OSHA) places the responsibility of investigating alleged incidents of violence on the employer. OSHA defines workplace violence by four major categories, each of which includes a violent act by an individual against a company's employee(s). Your legal duties are based on the risk of the four major types of workplace violence events occurring in a specific workplace. Remember that your workplace may be subject to more than one type of violence:

- Type I — The agent has no legitimate relationship to the workplace and usually enters the workplace to commit a robbery or other criminal act. Most recent statistics report that this represents the largest category of workplace violence (by number of incidents).
- Type II — The agent is either the recipient or the object of a service provided by the affected workplace or the victim. This type includes current and former patients, clients, customers, passengers, criminal suspects and prisoners.
- Type III — The agent has an employment-related involvement with the workplace. Usually this involves an assault or other violent act by a current or former employee toward a co-worker, supervisor or manager.
- Type IV — The agent has no direct relationship to the workplace, but typically is a current or former spouse, lover, relative or friend of an employee.

Security and Violence Prevention

Workplace Security Profile

Workplace Violence Factors and Control Checklist - OSHA

Workplace Violence Inspection Checklist - OSHA

Type I Events

If your employees are at risk for Type I events, you must address workplace security hazards to establish, implement and maintain an effective IIPP.[6] Some employees at risk for Type 1 events include taxicab drivers, clerks in liquor stores, convenience stores, grocery stores or gas stations that handle cash late at night, clerks in hotels or motels open late at night, jewelry store employees or security guards.

As a part of your IIPP, you must include all of the following information:

- A system to ensure that employees comply with safe and healthy work practices. Ensure that all employees, including supervisors, comply with work practices designed to make the workplace more secure. Ensure that employees do not engage in verbal threats or physical actions that create a security hazard to other employees in the workplace.[7]

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[6] 8 CCR sec. 3203

[7] 8 CCR sec. 3203(a)(2)

- A system to communicate with employees about workplace security hazards. Include a means that employees can use to inform you about security hazards at the worksite without fear of reprisal.[8]
- Procedures to identify workplace security hazards. Include scheduled periodic inspections to identify unsafe conditions and work practices when you are made aware of a new or a previously unrecognized hazard.[9]
- Procedures to investigate occupational injury or illness arising from a workplace assault or threat of assault.[10]
- Procedures to correct unsafe conditions, work practices and work procedures, including workplace security hazards. Include procedures for protecting employees from physical retaliation for reporting threats.[11]
- Training and instruction about how to recognize workplace security hazards, measures to prevent workplace assaults and what to do when an assault occurs. Include emergency action and post-emergency procedures.[12]

If your employees are known to be at risk for late night retail workplace violence, you must implement effective work practices and appropriate physical security measures.

Late Night Retail Violence Prevention Checklist

Type II Events

An increasing number of workplace assaults involve an attack on an employee who provides a service to a client, patient, customer or passenger. If your enterprise is at risk, you must integrate an effective workplace security component into your IIPP. The California Division of Occupational Safety and Health (Cal/OSHA) suggests that service employers at risk of workplace violence follow the Type I preventive measures when developing a workplace security component for an IIPP.

Controlling physical access through workplace design is an important preventive measure. This can include controlling access into and out of the workplace and freedom of movement within the workplace, in addition to placing barriers between clients and service providers. Escape routes are also a critical component of workplace design.

If you are at risk for Type II events, pay attention to communication problems. Provide your employees with instruction in how to effectively diffuse hostile situations involving clients, patients, customers, passengers and members of the general public to whom you provide services. In certain situations, installing alarm systems or panic buttons is an appropriate back-up measure. Establish a buddy system to use in specific emergency situations. Consider hiring security personnel where appropriate.

If you employ health care and community service staff who are at risk of workplace assault, you can use Cal/OSHA's *Guidelines for Security and Safety of Health Care and Community Service Workers* to establish and implement an effective workplace security component in your IIPP. For a copy of *Guidelines for Security and Safety of Health Care and Community Service Workers*, call Cal/OSHA at (415) 703-4341 or (800) 963-9424.

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8. 8 CCR sec. 3203(a)(3)
9. 8 CCR sec. 3203(a)(4)(C)
10. 8 CCR sec. 3203(a)(5)
11. 8 CCR sec. 3203(a)(6)
12. 8 CCR sec. 3203(a)(7)

Type III Events

Type III events are more closely tied to employer-employee relations than Type I or II events. To lessen the potential for Type III events, manage your employees in a considerate and respectful manner.

Establish and implement procedures to respond to Type III security hazards when they are present. Provide training to your employees and supervisors to satisfy the regulatory requirement of establishing, implementing and maintaining an effective IIPP. The Type I preventive measures provide guidance in developing a workplace security component to an IIPP. For more information, see "Type I Events" on page 649.

To effectively reduce the potential for Type III events, establish a clear anti-violence management policy. Apply the policy consistently and fairly to all employees and supervisors. Train employees and supervisors in workplace violence prevention. Investigate all allegations of threatening behavior.

Type IV Events

Statistics suggest that there are times when unhealthy relationships can spill over into the workplace. Take appropriate precautions to protect at-risk employees. For instance, when an employee reports that a non-employee threatened him/her, take specific precautions to ensure the threatened employee's safety, and the safety of other employees who may be in danger. Encourage employees who are involved in (or have decided to remove themselves from) hostile relationships in their private lives to inform HR, legal and/or security of the situation. Being aware of violent circumstances that could spill over into the workplace is vital to the safety of all employees.

Hire Security Guards

If you foresee criminal activity on your property, hire security guards. In *Lisa P. v. J. Gordon Bingham*, a California Court of Appeal ruled that a shopping center owed a duty to tenants and their employees to hire a security guard when there had been a string of armed robberies at the center.[13] The California Supreme Court decertified that decision, meaning the case cannot be used to support similar claims in the future. However, the California Supreme Court's decertification of this particular case does not mean that you do not have a legal duty to provide security.

Call Police About Potential Violence

If you have any concerns regarding potential violence, contact law enforcement. You may also want to consider what other resources, such as a threat assessment expert or legal counsel, are needed.

In *Aviles v. Cornell Forge,* an employer who called the police about a disgruntled ex-employee was not engaging in illegal retaliation under federal employment discrimination laws, according to a decision from the Seventh Circuit Court of Appeals. This case illustrates the difficult tightrope you must walk between complying with discrimination laws and providing for the safety of employees and customers.[14]

Aviles sued Cornell Forge under Title VII of the Civil Rights Act, asserting that the telephone call to police was in retaliation for Aviles filing a discrimination charge with the EEOC. The court found that Cornell Forge did not retaliate by calling the police to report that a disgruntled employee was waiting outside the workplace and may be armed.

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[13] *Lisa P. v. J. Gordon Bingham*, 43 Cal. App. 4th 372 (1996)

[14] *Aviles v. Cornell Forge*, 241 F.3d 589 (7th Cir. 2001)

"If an employer had to face Title VII liability for truthfully reporting to the police that a disgruntled employee had threatened a supervisor and could be armed, we might discourage employers from taking the most prudent action to protect themselves and others in the workplace," according to the court. On the other hand, the court said, "If the employer knew Aviles was just there to pick up his check, and that he was unarmed, then there would be a basis for finding that Cornell Forge retaliated against Aviles."

Understand Cal/OSHA's Response to Potential Security Hazards

Understanding how Cal/OSHA responds to allegations of workplace security hazards can help you prepare an effective workplace security strategy. Cal/OSHA responds to complaints of workplace security hazards in a similar manner to any other valid complaint. Cal/OSHA compliance personnel can conduct an on-site inspection of a workplace alleged to have a security hazard. During the inspection, they will attempt to answer the following questions:

- Does the workplace maintain an IIPP that addresses workplace security hazards?
- How effective is the IIPP at identifying and correcting workplace security hazards and in investigating workplace assaults?
- Does the employer provide employees with effective workplace violence prevention training?
- What are the establishment's physical characteristics and work practices that impact the security of the employees who work there?
- Did assaults occur at the establishment in the past? If so, how often and to what severity? What measures did the employer take to investigate the cause(s) of assault(s)? What corrective measures did the employer take to prevent other assaults?
- Is the inspected establishment at high risk of a Type I workplace violence event? If so, see the *Workplace Security Profile*.

Workplace Security Profile

Responding to Workplace Violence

You must be prepared to respond to violence in the workplace. Include a process for doing so in your IIPP, and communicate it to your supervisors and employees.

Plan Your Response to Workplace Violence

Although workplace violence is random and varied, it is possible to plan your response to it. Advance planning can decrease response time in the event of violence, possibly saving lives, reducing potential injuries and helping employees deal with the associated trauma as soon as possible. Concrete, achievable measures include:

- Identifying law enforcement contact information.
- Placing 911 on the speed dial of all office phones. If dialing 9 or some other key is necessary to get an outside line, ensure that it is programmed in along with 911.
- Knowing your county's procedure for obtaining a TRO against a violent or potentially violent person.

- Becoming familiar with specialized community resources, such as threat assessment specialists, trauma specialists, legal counsel and employee counseling groups. Keep phone numbers for these resources accessible in one place.
- Identifying people who are trained in cardiopulmonary resuscitation (CPR) by placing a star next to their names on an interoffice telephone extension list. You can choose to pay for the annual refresher courses for these employees, and/or the basic course for other employees who want to learn CPR.
- Determining in advance who is responsible for coordinating a response to workplace violence, such as a dedicated crisis response team.
- Determining what steps can be taken to secure the workplace against an imminent threat.

Investigate Reports and Threats of Workplace Violence

Take all reports and threats of workplace violence very seriously. Your thorough response may discourage a person who makes a threat from acting upon it, reassure employees that their health and safety is of the utmost importance, prevent injuries and save lives.

Take the following steps when an employee reports a violent workplace act or a threat of such an act:

- Your first obligation is to secure the workplace and protect employees, customers and other individuals. Depending on the imminence or severity of the threat, this may involve law enforcement.
- Take a complete report of the incident from the individual reporting it. Reassure the individual that reporting the incident was the correct thing to do and that you will conduct a thorough investigation. Ask him/her for as much detail as possible and for the names of any witnesses.
- Consider the allegedly violent person's status:
    - If the person is an employee, a suspension may be appropriate until the investigation is complete.
    - If the person is not an employee, consider the likelihood that he/she will return to your workplace. Devise methods to keep him/her away until you complete the investigation. For example, if a vendor or someone else who provides service to the business is suspected of violence, telephone that person's supervisor to insist that he/she be kept away from your workplace until further notice. If a customer is alleged to have committed a violent act in your workplace, immediately notify security, receptionists and others who have initial contact with the public.
    - Think about the necessity of a restraining order.
- Conduct an investigation. When investigating a threat of workplace violence, always ask who made the threat, the exact language used, who was threatened, the tone of voice and attitude of the individual making the threat, the location and time the threat was made and if any previous threats were made. A clearly documented record of the investigation is essential if legal action stems from the incident.
    - Interview witnesses, if any. Interviewing witnesses allows for a better assessment of whether the threat is genuine or whether the violent act actually occurred as the initial reporting individual said it did. Ask all witnesses if any additional witnesses may exist.
    - Interview the individual alleged to have made the threat. A good-faith effort to hear this individual's side of the story is essential, especially in a lawsuit for wrongful termination or discrimination. Never hold the individual against his/her will; this may constitute false imprisonment.

  - Assess the information gathered. Make a good-faith decision. If the allegations appear to be true, decide the next appropriate step. This can include disciplining or terminating an employee, terminating a business relationship, filing a police report and/or applying for a TRO.

You must provide "a safe and secure workplace and encourage employees to report credible threats of violence in the workplace." Terminating employees because they report threats is a violation of California law.[15]

Employers must provide a safe and secure workplace. They must also take reasonable steps to address threats of violence that an employee reasonably believes will be carried out and that cause him/her to fear for his/her safety or the safety of his/her family. Further, it is the policy in California to protect employees from retaliation if they complain. These requirements are a fundamental and substantial public policy in California that protects employees and the general public.

Obtain Temporary Restraining Orders

Businesses and public agencies can obtain TROs against individuals who make credible threats of violence or harass or stalk their employees.[16]

A TRO can prevent an alleged perpetrator from gaining access to an alleged victim. Typically, a TRO prohibits an alleged perpetrator from coming within a specified distance of the alleged victim's home and workplace. A TRO also prohibits personal and telephone contact. Although a TRO does not guarantee that violence will not occur, it does allow the police to restrain and/or arrest the perpetrator before any actual intent to engage in further violent behavior becomes apparent.

You can obtain a TRO on behalf of an employee who was subjected to violence or threats of violence in the workplace. You may also be able to seek the TRO on behalf of other employees, at the court's discretion.[17]

A credible generalized threat of violence against employees is enough to permit an employer to seek relief on behalf a particular employee, despite the absence of a direct threat against that employee.[18]

Notify Workplace Violence Victims of Workers' Compensation Benefits

Employees who have suffered workplace violence may be entitled to workers' compensation benefits. Employers are obligated to provide the victim appropriate notice of the benefits for which he or she is eligible, which may include:

- Medical treatment for any injuries resulting from the incident, including psychiatric injuries;
- Lost wages; and
- Rehabilitation services.

You must provide the written notice either personally or by First Class mail within one day of the employment crime or within one day of the date that you should have reasonably known of the crime.[19] For more information on workers' compensation, see Chapter 25, "Workers' Compensation."

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[15] *Franklin v. The Monadnock Company et al.*, 151 Cal. App. 4th 252

[16] Code of Civil Procedure, sec. 527.8

[17] Code of Civil Procedure, sec. 527.8

[18] *USS-POSCO Industries v. Edwards*, 111 Cal. App. 4th 436 (2003

[19] Lab. Code sec. 3553

Consider Other Employee Benefits

Victims of workplace violence also are entitled to the same leave protections as any other employee. An employee who has suffered a serious health condition, whether mental or physical, as a result of workplace violence may be entitled to family and medical leave. For more information, see Chapter 18, "Family and Medical Leave."

Special leaves of absence may apply as well:

- Employees who are victims of domestic violence, stalking or sexual assault are permitted to take time off for legal proceedings and/or medical treatment. For more information, see "Domestic Violence, Sexual Assault and Stalking Victims' Leave" in Chapter 22, page 581. They can also use paid sick leave under California's Healthy Workplaces, Healthy Families Act. For more information, see "Paid Sick Leave" in Chapter 20, page 535.
- An employee who is the victim of a violent felony may take time off to attend judicial proceedings related to the crime. For more information, see "Crime Victims' Leave" in Chapter 22, page 586.
- Finally, a victim of workplace violence may be eligible for disability accommodation under the Americans with Disabilities Act. For more information, see "Disability Leave" in Chapter 28, page 876.

Whether the employee is entitled to compensation during such leaves will depend on the employer's policy and practice. Employees using mandatory paid sick leave are entitled to compensation.

Providing ongoing support to employee victims is also a best practice. That support may include anything from access to an employee assistance program to additional support, such as onsite counseling or team building. Employers should remain flexible in the aftermath of an incident and support employees as needed.

Recording and Reporting Incidents of Workplace Violence

Cal/OSHA requires employers to record all fatalities, illnesses and specified injuries that occur as a result of workplace violence on their Cal/OSHA record keeping logs.[20] Some employers are exempted from recording work-related injuries and illnesses.[21]

Workplace violence includes assaults that take place on your premises and at other locations where employees engage in work-related activities or are present as a condition of employment. You must record workplace homicides and non-fatal assaults that resulted in a recordable death, injury or illness. Understand that recording these events does not imply that you or your employee was at fault, that the injury or illness is compensable under workers' compensation or other systems or that a violation of a Title 8 Safety Order or a Penal Code section occurred.

In addition to entering the case on the Cal/OSHA record keeping log, when you receive information that a recordable case has occurred, you must prepare a supplementary record for that case. Typically, you use the California *Employers Report of Occupational Injury or Illness* for the supplementary record, although you can use an equivalent form. You must retain the supplementary record at the establishment where the injured or ill employee is employed.

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[20] 8 CCR secs. 14300-14400

[21] 8 CCR secs. 14300.1, 14300.2

In addition, for every occupational injury or illness, you must file an *Employers Report of Occupational Injury or Illness* with your workers' compensation insurer.

Employers Report of Occupational Injury or Illness

Requirements for recording and reporting workplace violence to OSHA are broader than the requirements for recording and reporting events to Cal/OSHA.[22] OSHA requires you to *record* fatal and non-fatal injuries and illness caused by workplace violence, and to meet the recordability requirements discussed above. However, the requirement for you to *report* the same fatality, injury or illness to Cal/OSHA is more limited. In every case involving a serious injury, illness or death, you must make a report within eight hours to the local Cal/OSHA district office by phone or fax.[23] You can find the local Cal/OSHA district office telephone number in the phone book, usually under "Government Pages - State Government Offices - Industrial Relations Department - Occupational Safety and Health (Cal/OSHA)."

The California Labor Code defines "serious injury or illness" as:[24]

> ... any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement, but does not include any injury or illness or death caused by the commission of a Penal Code violation, except the violation of section 385 of the Penal Code, or an accident on a public street or highway.

Even though a workplace assault resulting in an employee's death or in specified types of injuries is recordable on the record keeping log and reportable to the insurer or to the Department of Industrial Relations (DIR), it may not be reportable to Cal/OSHA if it is caused by the commission of a Penal Code violation. For more information, see "Reporting Serious Injury or Death" in Chapter 23, page 611 and "Recording Work-Related Injuries and Illnesses" in Chapter 23, page 613.

Industry-Specific Workplace Violence Requirements

Health facilities must develop and evaluate security plans. The California Department of Public Health licenses and regulates hospitals. Hospitals must conduct a security and safety assessment. Using the assessment, a hospital must develop a security plan with measures to protect personnel, patients and visitors from aggressive or violent behavior. The plan must include specified security considerations.

Hospitals must annually review and update the security and safety assessment and plan. This law permits the plan to include security considerations relating to efforts to cooperate with local law enforcement about violent acts in the facility and would require the hospital to consult with affected employees, including the recognized collective bargaining agent or agents, if any, and members of the medical staff.

New 2016

The California Division of Occupational Safety and Health (Cal/OSHA) requires specified hospitals to establish workplace violence prevention plans to protect health care workers and other facility personnel from aggressive and violent behavior. This requirement is contained in Labor Code Section 6401.8, a law that takes effect on July 1, 2016.

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[22] Lab. Code sec. 6409.1

[23] Lab. Code sec. 6409.1(b)

[24] Lab. Code sec. 6302(h)

Specifically, the standards adopted by Cal/OSHA require acute care and acute psychiatric hospitals to adopt workplace violence prevention plans as part of their injury and illness prevention programs. The workplace violence prevention plans should include the following (but should not be limited to):[25]

- Training on how to recognize and respond to violence, and resources available to employees who are victims of violence.
- How to respond to, and investigate violence incidents.
- Assessment of factors that contribute to violence in the hospital, including sufficiency staffing, security, access, and lighting.
- Freedom of employees to seek help from law enforcement.
- Requirements for hospitals to document and report incidents of violence to Cal/OSHA.

Employers in these industries should seek advice on creating compliant plans.

Workplace Violence Requirements for Community Health Care Workers

You must keep a record of any violence committed against a community health care worker.[26] You must file a copy of that record with the DIR. At the time of this printing, the DIR had not developed a form for this report, nor had it developed a specific timeline for reporting. It's recommended that you document the incident and report it as soon as possible using a narrative to describe the nature of the incident.

When discussing workplace violence requirements for community health care workers:

- A "community health care worker" is an individual who provides health care or health care related services to clients in home settings.
- "Violence" is a physical assault or a threat of a physical assault.

People who receive home-based services who are responsible for hiring their own community health care workers need not keep records or make reports. The law intends to allow the DIR to track workplace violence to determine if a workplace violence problem exists for California health care and community care workers, and, if so, to what extent the problem exists. For more information, visit the DIR's website at www.dir.ca.gov.

Further Information

Some of the information in this chapter was based on Cal/OSHA's *Guidelines for Workplace Security*. For a complete copy of the guidelines, write to:

Department of Industrial Relations
Division of Occupational Safety and Health
1515 Clay Street, Suite 1901
Oakland, CA 94612

Also see Cal/OSHA's *Guidelines for Workplace Security* at www.dir.ca.gov/DOSH/dosh_publications/worksecurity.html. Cal/OSHA's Workplace Security Advisory Committee developed these guidelines to provide information and guidance to California employers and employees about workplace security issues. Also available from Cal/OSHA is a *Model IIPP for Workplace Security* at www.dir.ca.gov/DOSH/dosh_publications/iipsecurity.html.

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[25] Lab. Code sec. 6401.8

[26] Lab. Code sec. 6332

Chapter 25

Workers' Compensation

Workers' compensation insurance is a no-fault insurance system. If an employee suffers an injury on the job, the employer is liable for the employee's temporary disability benefits, medical expenses and possibly a permanent disability award based on the long-term effects of the injury.

This chapter provides you with basic information on workers' compensation law. You will find information on:

- What workers' compensation is
- Who is and isn't covered
- The injuries covered by workers' compensation
- Required notices and posters
- What to do when an injury occurs
- Injury types
- Penalties for workers' compensation fraud
- Recording and reporting obligations
- Family medical leave
- Employee benefits issues

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CalChamber would like to thank Ellen Sims Langille for her contribution to the Workers' Compensation chapter.

Ms. Langille is a partner at Finnegan, Marks, Theofel & Desmond, and her current practice specializes in workers' compensation appeals. She has achieved notable success in several published decisions from California's District Courts of Appeal and the California Supreme Court.

More information on Ms. Langille and Finnegan, Marks, Theofel & Desmond can be found on the law firm's website at http://fmtdlaw.com/.

What Is Workers' Compensation?

Workers' compensation insurance is a no-fault insurance system. In the compensation bargain created by the California Workers' Compensation Act, you give up your right to challenge a claim of negligence causing injury, and your employees give up the right to sue you for far greater damages in civil court. Essentially, you are liable for work-related injuries and illnesses, but your employees usually cannot sue for additional damages.

If there is any doubt that workers' compensation is applicable to a particular situation, the Division of Workers' Compensation (DWC) generally rules in favor of coverage. Workers' compensation coverage benefits employers by making workers' compensation the "exclusive remedy" for workplace injuries or illnesses. However, there are exceptions to workers' compensation exclusivity, either created by statute or court decision. For examples, see "Covered Employers and Employees" on page 661 and "Exceptions to the Exclusive Remedy of Workers' Compensation" on page 668.

Workers' Compensation Benefits and Administration

Workers' compensation provides:

- No-cost medical care to "cure" or "relieve" the injured employee of the injury's effects.
- Varying levels of tax-free replacement income during periods of temporary inability to earn income. If the employee returns to modified or alternate work paying a lesser wage than the usual and customary position, workers' compensation may continue to cover the employee for a time. The amount of time and compensation depends on the disability's nature, severity and duration.
- Tax-free benefits for those who suffer varying degrees of permanent disabilities.
- Tax-free benefits for an employee's surviving dependents if the work-related injury is fatal.

The DWC within the Department of Industrial Relations (DIR) administers workers' compensation programs. The DWC assists employers and employees with workers' compensation law and specific workers' compensation claims.

In serious injury cases, the nature and extent of benefits owed will be determined through a process involving a medical evaluation by a qualified medical evaluator, and then reviewed by a workers' compensation judge.

New 2016

Effective October 1, 2015, in cases where the employee is represented by an attorney, the parties may obtain assignment of a three-member panel of medical legal evaluators from the DWC Medical Unit through an online submission process.[1]

Workers' compensation judges within the DWC approve settlements and resolve disputes about:

- The cause of an illness or injury.
- Occupation type.
- The need for and scope of medical treatment.
- The nature and extent of a disability.

The Workers' Compensation Appeals Board (WCAB) can adopt, confirm, modify or set aside decisions or findings of workers' compensation judges.[2] The WCAB decisions are subject to review by state appeals courts.[3]

Workers' Compensation Reform (SB 863)

Workers' compensation claims continue to be greatly affected by reform legislation enacted in 2012 (SB 863).

SB 863 funded and offset increases in permanent disability benefits with a portion of savings obtained from system reforms. SB 863 lowered system costs for employers by:

- Reducing delays and litigation in the system

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[1] 8 C.C.R. sec. 30(b)

[2] Lab. Code sec. 5315

[3] Lab. Code sec. 5950

- Addressing the lien epidemic
- Shortening the medical-legal process
- Implementing an independent medical review system for treatment disputes
- Implementing an independent bill review process for treatment services
- Streamlining the permanent disability schedule

Although some of the provisions of SB 863 took effect January 1, 2013, many of the laws require administrative/regulatory action before implementation. The DIR and the DWC have been working to prioritize and implement these regulations, but some implementation rules have still not been finalized.

In addition, some statutes, such as the permanent disability benefit increase, specifically apply only to injuries occurring on or after January 1, 2013. Other statutes only apply for dates of injury after January 1, 2014.

Employers should continue to expect that there will be challenges to the new reform laws through litigation and challenges during the regulatory process.

To the extent that any of the reform measures impact this chapter at the time of publication, updates have been made to reflect the legislative changes.

Covered Employers and Employees

This section describes employers, employees and types of injuries covered by workers' compensation.

Employers Covered by Workers' Compensation

Workers' compensation law applies to the following employers:

- California state government and its agencies, cities and counties
- Public and quasi-public corporations
- For-profit corporations and partnerships
- Nonprofit corporations and organizations
- Sole proprietorships

The law's definition of "employer" includes any entity that has a person "in service."[4]

Workers' Compensation Coverage Agreements Between Employers

In the past, employers were able to enter into valid agreements to lease employees, and the agreement could be drafted to protect the employer from liabilities including workers' compensation coverage.

New 2016

California law imposes liability for the failure to obtain workers' compensation coverage on both the labor contractor as well as the contracting business.[5]

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[4] Lab. Code sec. 3300

[5] Lab. Code sec. 2810.3(b)

If a staffing agency fails to secure workers' compensation coverage, you as the contracting employer will be held responsible for an employee's injury, regardless of whether you controlled working conditions or wages.

Employers are cautioned to consult with legal counsel to ensure the validity of any leasing agreement, and especially to ensure that the staffing agency with whom you contract for employees carries full workers' compensation insurance.

Homeowners, home-based businesses, public employers, businesses with five or fewer staffing agency workers, and businesses with fewer than 25 employees overall are exempted. For more information, see "Leased Workers" in Chapter 6, page 89.

Employees Covered By Workers' Compensation

Employee coverage begins the instant the employee begins work, unless excluded by the Labor Code. An "employee" means any person who is in the service of another person or organization, whether lawfully or unlawfully employed.[6] The person can work under an oral or written contract, an explicit or implied contract, an apprenticeship or even an unlawful arrangement.

Workers' compensation coverage extends to:

- Illegal immigrants
- Minors
- Elected and paid public officials
- Qualified persons who are employed by the owner or occupant of a residential building and who are performing duties incidental to the use, ownership, or maintenance of the residence (e.g., painters, gardeners, nannies)[7]
- Paid officers and directors of private or quasi-public corporations[8]

Any person working for another person is presumed to be an employee unless:

- He/she is an independent contractor, under the employer's control only in terms of final product rather than details of performing the work. For more information on independent contractors, see "Independent Contractors" in Chapter 6, page 96.
- He/she is an officer or director of a private corporation, where such officers or directors are the sole shareholders of the corporation and have not elected to be covered.[9]
- He/she is performing services in return for aid or sustenance only, received from a charitable organization.[10]
- He/she is performing services incidental to the use, ownership, or maintenance of a private residence for less than 52 hours, or earning less than $100, in the 90 days preceding the injury.[11]
- The Labor Code specifically excludes him/her.[12] For more information, see "Who Isn't Covered by Workers' Compensation?" on page 663.

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[6] Lab. Code sec. 3351

[7] Lab. Code sec. 3351(d); Lab. Code sec. 352(h)

[8] Lab. Code sec. 3351(c)

[9] Lab. Code sec. 3351(c)

[10] Lab. Code sec. 3352(c)

[11] Lab. Code sec. 3352(h)

[12] Lab. Code sec. 3357; for a partial listing of employees specifically excluded from coverage, see Lab. Code sec. 3352

Contractors and Workers' Compensation

Evidence of workers' compensation coverage may be a required condition before issuance or renewal of a license.[13]

The registrar of contractors can issue a stop order to any licensed or unlicensed contractor who failed to secure workers' compensation coverage for his/her employees. The order is effective immediately. Additionally, you must pay employees who are affected by the work stoppage for lost time, up to 10 days, while you seek to comply with the law.[14]

Failure to observe the stop order is punishable by a misdemeanor, up to 60 days in county jail and/or a fine of up to $10,000. You can protest the stop order and request a hearing.

The requirement for a contractor to maintain workers' compensation coverage does not apply to licensees who have filed proper notice with the Contractors State License Board verifying that he/she does not have any employees.[15] Be aware that the filing of a false exemption certificate, or the hiring of an employee after filing an exemption certificate, could subject you to disciplinary action by the Contractors' State License Board.

Contractors with a C-39 roofing classification must obtain and maintain workers' compensation insurance, even if they do not have any employees. This requirement was set to expire on January 1, 2011, but is extended indefinitely. After January 1, 2011, any active license will be suspended if the C-39 roofing classification was removed and the licensee is found to have employees without a valid certificate of workers' compensation insurance.

Who Isn't Covered by Workers' Compensation?

Employees who are not covered by workers' compensation include:[16]

- Self-employed people
- Volunteers for a public agency or a private, nonprofit organization[17] and certain recreational camps, except certain public safety personnel[18]
- Deputy clerks, sheriffs or constables appointed for their own convenience without compensation
- Ski lift operators participating in recreational activities and uncompensated ski patrol
- Uncompensated participants in sports or athletics, students in amateur sporting events and certain sports officials at nonprofessional events
- People who are performing services in return for aid from religious, charitable or relief organizations
- Casual employees who do not qualify as residential employees[19]
- Certain out-of-state law enforcement personnel deputized to work or acting as peace officers in California
- Independent contractors

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[13] Bus. & Prof. Code sec. 7125

[14] Bus. & Prof. Code sec. 7127

[15] Bus. & Prof Code sec. 7125.2(a)

[16] Lab. Code sec. 3352

[17] Lab. Code sec. 3352

[18] Lab. Code secs. 3361-3368

[19] Lab. Code sec. 3352(h); see also Lab. Code sec. 3351(d)

Independent Contractors and Workers' Compensation

An independent contractor is "any person who renders service for specified recompense or a specified result under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished."[20] Independent contractors are not considered to be employees covered by workers' compensation.[21] For more information, see "Defining Independent Contractor" in Chapter 6, page 98.

Many factors are considered in the determination of independent contractor status, including:

- If the individual possesses the right to control production
- If the individual exercises discretion over the manner in which he/she performs the services

When a court rules on what constitutes legitimate status as an independent contractor for workers' compensation purposes, the court may rely on:

- The individual's substantial investment and capital outlay in his/her business
- The individual holding himself/herself out to be a functioning business
- The right to control factors[22]

In the construction industry or trades, the individual must possess a valid contractor's license to be considered an independent contractor. If the person performing services does not possess a license, the law presumes the person is an employee rather than an independent contractor.[23]

For more information on independent contractors, see "Independent Contractors" in Chapter 6, page 96.

Subcontractor Employees

As a general rule, if a subcontractor's employee is injured by the subcontractor's negligence, the employee cannot sue the general contractor.

> **Example:** In *Toland v. Sunland Housing Group, Inc.*, a subcontractor's employee was seriously injured on the job as a result of the subcontractor's negligence. He filed for workers' compensation benefits. The employee also sued the general contractor in civil court, claiming that the general contractor did not require the subcontractor to take adequate precautions. The court ruled that it would be unfair to subject the general contractor to civil litigation when the subcontractor, who controlled the work, could not be subjected to civil litigation because of the rule of workers' compensation exclusivity.[24]
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> The courts have applied the same protection to the property owner,[25] even though its general contractor failed to ensure that a subcontractor whose employee was injured maintained workers' compensation insurance.[26]

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[20] Lab. Code sec. 3353

[21] Lab. Code sec. 3357

[22] *Estrada v. FedEx Ground Package System, Inc.*, 154 Cal. App.4th (2007)

[23] Lab. Code sec. 2750.5

[24] *Toland v. Sunland Housing Group, Inc.*, 18 Cal. 4th 253 (1998)

[25] *Privette v. Superior Court*, 5 Cal. 4th 689 (1993)

[26] *Lopez v. C.G.M. Development, Inc.*, 101 Cal. App. 4th 430 (2002)

Example: In *McKown v. Wal-Mart Stores, Inc.*, the California Supreme Court stated that when a hiring organization provides faulty equipment to a contractor's employee, the hiring organization can be held liable in civil court for injuries the equipment caused.[27]

Example: In *Hooker v. Department of Transportation*, the court held that when a hiring company that retains control of safety in the work environment and is negligent in exercising that control, the hiring company can be held liable for any injuries that occur as a result. In this particular case, however, no liability was found.[28]

Example: An employer can delegate to a contractor the duty to ensure the safety of the specific workplace that is the subject of the contract. In *Seabright Insurance Company v. U.S. Airways, Inc.*, an airline hired an independent contractor to maintain and repair a conveyor used to move luggage. The conveyor lacked certain safety guards required by applicable regulations. An employee of the contractor was inspecting the conveyor and his arm got caught in its moving parts.

The issue was whether the airline could delegate the duty to provide a safe workplace to its contractor, with respect to the safety of the contractor's employees. The California Supreme Court held that it could.

The court noted that the general rule is that when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work.

By hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract. The court emphasized that the airlines owed its own employees a non-delegable duty to provide a safe workplace. But the employees of the independent contractor could not look to U.S. Airways for relief.[29]

Covered Injuries

You must provide compensation for any employee injury or death that results from employment or occurs on the job, without regard to negligence. You must provide compensation when:

- An employment relationship exists.
- The employee is acting within the course of employment, performing services arising out of and incidental to employment at the time of injury.
- The injury is legally caused by the employment, either with or without negligence.

For purposes of workers' compensation, an injury is deemed to be job-related:

- When it arises out of employment (AOE), based on the particular risks presented by the employment
- When it occurs in the course of employment (COE), so that the injury occurs while the employee is performing work[30]

In California, an industrial injury does not have to be a physical injury; it can also be an emotional injury due to stress or trauma caused by the employment. You may also have to provide compensation for injuries related to stress. For a complete discussion of injuries related to stress, see "Stress-Related Injuries" on page 673.

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[27] *McKown v. Wal-Mart Stores, Inc.*, 27 Cal. 4th 219 (2002)

[28] *Hooker v. Department of Transportation*, 27 Cal. 4th 198 (2002)

[29] *Seabright Insurance Company v. U.S. Airways, Inc.*, 52 Cal.4th 590 (2011)

[30] Lab. Code sec. 3600(a)(2)

When a claim is presented, the DWC first determines if the injury or death arose out of employment and occurred in the course of employment. An injury meets these standards if:

- The job played an "active" role and a "positive" factor in the injury's development.
- You required the activity that resulted in the injury, or employees reasonably believed that the activity was required.

California courts have ruled that an injury must be caused by something to which the employee was exposed during his/her employment. The employment and the injury must be linked, but the employment need not be the sole cause of the injury.

New 2016

A decision from the California Supreme Court clarified that the employment need only be one of the contributing causes without which the injury would not have occurred.[31] The case involved an injured employee who was prescribed medication for unrelated conditions as well as for his industrial injury. Following an overdose causing the employee's death, the medical expert determined that the medication prescribed for the industrial injury had only contributed "a few crumbs of the causation pie" resulting in death. The Supreme Court ruled that this was nevertheless sufficient to support industrial causation, and awarded full benefits.

Alternatively, the employee can prove entitlement to benefits by showing that his/her employment brought him/her into the "range of danger." For this type of case, industrial injury can be proven if the employment has caused the employee to be in a particular location where the injury occurred:

> **Example:** In *Employers Mutual Liability Insurance Co. v. I.A.C. (Gideon)*, an employee suffered a fall at work due to a pre-existing seizure condition. When he fell, he struck his head on the cement floor. The Supreme Court held that while the seizure itself was non-industrial, the head injury was compensable because the cement floor was in an area of the workplace where the employee was required to work.[32]
>
> **Example:** In a low-level decision with very unusual facts, *Schneider v. Reliance Insurance Company*, an assistant physics professor from Stanford University was granted a sabbatical during which he was to perform research and publish the results. He relocated to New Jersey, where he was able to fulfill his work obligation while responding to a personal obligation that would have otherwise inhibited his work. He was able to continue his work by using his laptop computer to write and maintain contact with the university. While the professor was seated at a coffee shop working on his laptop, a motorist lost control of his vehicle, crashed into the coffee shop and killed the professor. The Workers' Compensation Judge (WCJ) ruled the death compensable. The WCAB upheld the ruling.
>
> The evidence showed that the professor was working within the scope of his employment, and the location of his work was defined by the location of the laptop. Though the university did not specifically direct the professor to be at the coffee shop, he would not have been there but for the pressures of his employment and the need to produce research papers.[33]
>
> **Example:** In a contrasting case, *Richard v. WCAB (Kaiser Permanente Medical Group)*, an employee whose work required her to travel between two employer facilities made stops along the way at her bank and insurance agent's office to handle personal business. While doing so, her car was rear-

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[31] *South Coast Framing v. WCAB* (Clark) 61 Cal. 4th 291 (2015) (rejecting arguments that employment must be "significant factor" or "material factor" causing injury)

[32] *Employers Mutual Liability Ins. Co. v. IAC (Gideon)*, 41 Cal. 2d 676 (1953)

[33] *Schneider v. Reliance Insurance Company*, 30 CWCR 249 (2002) (Board Panel Decision)

ended and she was injured. Compensation was denied because her deviations from employment constituted a substantial detour, placing her outside the course of her employment.[34]

You are generally deemed responsible to provide workers' compensation for injuries that occur:

- During personal acts characterized as incidental to work, such as cooling off during a compensated break on a hot day,[35] picking up a purse,[36] or using the rest room[37]
- Within a reasonable distance or time away from or approaching work, such as in a company-provided parking lot
- During travel or commute that is paid or a reasonable requirement of employment (for more information, see "Employee Injuries While Commuting" on page 669)
- During a compensated meal period or a meal time taken on work premises

In addition, you may be responsible for an aggravation of a prior medical condition[38] or if an injury occurs as a compensable consequence of an earlier work-related injury.[39]

Types of Injuries Covered

Workers' compensation covers the following types of injuries:

- Specific physical injury
- Cumulative physical injury
- Specific mental injury
- Cumulative mental injury

An injury is "specific" if one incident or exposure in the workplace causes a physical or mental injury. An injury is "cumulative" if repetitive, traumatic activities in the workplace caused a physical or mental injury over an extended period of time.[40]

Workers' compensation covers injuries regardless of the level of medical care necessary. Workers' compensation covers injuries if:

- Medical treatment is required
- First aid is required
- Surgery is required
- The injury is disabling[41]

Combined Workers' Compensation Award for Specific and Cumulative Injuries

If an employee suffers from a specific injury and a cumulative injury, regardless of when the injury occurred, he/she is entitled to two separate awards — one for each injury. The employee is not entitled to a combined award with a longer payout period, because a combined award is contrary to legislative intent.[42]

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[34] *Richard v. WCAB (Kaiser Permanente Medical Group)*, 67 CCC 195 (2002) (Writ Denied)

[35] *State Compensation Insurance Fund v. WCAB*, 67 Cal. 2d 925 (1967)

[36] *Foundation v. WCAB (Gutierrez)*, 71 CCC 261 (2006) (Writ Denied)

[37] *Allied Signal Co. v. WCAB (Briggs)*, 66 CCC 1333 (2001) (Writ Denied)

[38] *Maher v. WCAB*, 33 Cal. 3d 729 (1983)

[39] *Ballard v. WCAB*, 3 Cal. 3d 832 (1971)

[40] Lab. Code sec. 3208.1

[41] Lab. Code sec. 3208.1

Exclusive Remedy for Workplace Injuries

Workers' compensation is the exclusive remedy for work-related injuries. This means, for example, that an employee cannot sue an employer in civil court for emotional distress or negligence unless the conduct falls outside the normal employment relationship. In most instances, the employee's sole remedy against the employer is in the workers' compensation forum.

Likewise, the exclusive remedy rule prevents claims against fellow employees acting within the scope of their employment.[43] However, the following exceptions apply:

- When the injury or death is legally caused by the other employee's willful and unprovoked physical act of aggression
- When the injury or death is legally caused by the other employee's intoxication[44]

Exceptions to the Exclusive Remedy of Workers' Compensation

Although in most circumstances, workers' compensation is the exclusive remedy for work-related illnesses and injuries, there are legal exceptions to this exclusivity. You are not protected from civil litigation if:

- The employee's injury or death is legally caused by your willful physical assault.
- The employee's injury or death is legally caused by a defective product that you manufactured and sold, leased or otherwise transferred to a third person, and the third person provides that product for the employee's use.
- The employee's injury is aggravated by your fraudulent concealment of the injury's existence and its connection with the employment. In this case, your liability is limited to the damages legally caused by the aggravation. It is your responsibility to prove which damages were due to the original injury and which were due to the subsequent aggravation.[45]
- The employee's injury is caused by your actions which are outside the compensation bargain. This means that where the employer has violated an express statute or engaged in conduct against a fundamental public policy (e.g., false imprisonment, disability-based discrimination or sexual harassment), then the employer can be held liable for damages in civil court. But otherwise, provided the employer conduct occurs in the normal course of the employer-employee relationship, even outrageous conduct causing severe emotional distress falls within the exclusive province of workers' compensation.[46]

Exclusions From Workers' Compensation Coverage

In some cases, an employee could be disqualified from receiving workers' compensation benefits even if the employee was injured on the job. An injury is not covered by workers' compensation law if the employee:

- Was intoxicated by alcohol or drugs at the time of the injury

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42. *Benson v. WCAB*, 170 Cal. App. 4th 1535 (2009)
43. Lab. Code sec. 3601
44. Lab. Code sec. 3601(a)(1) and (2)
45. Lab. Code sec. 3602
46. *Miklosy v. Regents of University of California*, 44 Cal.4th 876 (2008); see also *Yau v. Santa Margarita Ford*, 226 Cal.App.4th 144 (2014)

- Intentionally inflicted the injury or committed suicide
- Engaged in an altercation in which he/she was the initial physical aggressor
- Engaged in committing a felony for which he/she has been convicted
- Engaged in horseplay on your premises or during a period when he/she was being compensated
- Engaged in voluntary participation in off-duty recreational, social or athletic activity not constituting his/her work-related activities, unless those activities are a reasonable expectancy of employment
- Was going to or coming from work, unless you exercise control over the employee's route, the employee's activities during the commute or the employee's mode of transportation[47]

Sports Activities and Workers' Compensation

Generally, an injury is not compensable if it occurs during voluntary participation in an off duty recreational, social or athletic activity that is not part of the employee's work-related duties. However, an injury may be compensable if the activities are a reasonable expectancy of employment, are explicitly or implicitly required by employment.

In one case, the court found little evidence to support an off-duty police officer who believed that his employer expected him to engage in an occasional pickup basketball game. General assertions that it would benefit the employer, or even that the employer expects an employee to stay in good physical condition, are not sufficient to require workers' compensation for injuries suffered during any recreational or athletic activity in which the employee chooses to participate.[48]

But in a case involving a part-time law clerk injured at a firm-sponsored softball game, the court held that the employee was entitled to receive workers' compensation benefits where the evidence showed that it was reasonable for her to believe she was expected to participate in the event.[49]

Employee Injuries While Commuting

Employees are not covered by workers' compensation while "going and coming" to and from work unless specific circumstances apply.[50]

Courts have ruled that the employment relationship is suspended during the commute period. As a result, injuries that occur when an employee is engaged in an ordinary commute during regular hours, off-duty travel or travel off of the employer's premises do not fall under the "course of employment" according to the Workers' Compensation Act.

One exception is where the employment creates a "special risk."[51] The special risk exception applies in the following circumstances:

- "But for" the employment, the employee would not have been at the location where the injury occurred.
- The risk is distinctive or quantitatively greater than risks "common to the public." [52]

If the travel or commute time is paid, you may be deemed as responsible.

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[47] Lab. Code sec. 3600.8

[48] *City of Stockton v. WCAB*, 135 Cal. App. 4th 1513 (2006)

[49] *Ezzy v. WCAB*, 146 Cal. App. 3d 252 (1983)

[50] *Hinojosa v. WCAB*, 8 Cal.3d 150 (1972)

[51] *Parks v. WCAB*, 33 Cal.3d 585 (1983)

[52] *General Ins. Co. v. WCAB*, 16 Cal. 3d 595 (1976)

Aggravation of a Previous Injury or Illness

You may be responsible under workers' compensation for an injury to an employee if that employee's prior non-industrial medical condition was aggravated by his/her employment. For example, the Workers' Compensation Appeals Board (WCAB) has held that the employer is responsible for increased disability caused by work activity, even if the underlying disease process pre-existed the employment.[53]

You may also be responsible for workers' compensation if the injury occurs as a "compensable consequence" of an earlier industrial injury. A Court of Appeal has held that an injury sustained in a car accident while en route to a medical treatment appointment for an industrial injury is also compensable, even though the original industrial injury did not "cause" the accident.[54]

You may also be responsible for injuries that did not originally occur at work, if the employment caused the condition to worsen. For example, in *Weber v. United Parcel Service, Inc.*, the employee underwent several hearing tests administered at work by an independent contractor to determine if exposure to noise at work affected his hearing. He relied on the employer to evaluate the tests and tell him of any condition requiring further attention. Although the tests showed abnormalities, neither the employer nor the testing agency notified the employee. Many years later, the employee was diagnosed with a brain tumor.

Because of the delay in diagnosis, the employee was required to undergo more serious and invasive treatment than he would have if he had received treatment earlier.

The court ruled that the employee could not sue in civil court but could recover under workers' compensation law. Although the origin of the condition was not work-related, the condition worsened because the employer failed to properly evaluate and communicate the hearing test results.[55]

Employees may also bring claims for psychiatric or emotional conditions that are the compensable consequence of an underlying physical injury for which the employer is liable. For example, an employee may claim that his leg was injured on the job by a forklift and that he now has a sleep disorder from the physical injury.

For injuries on or after January 1, 2013, SB 863 eliminated compensation for permanent impairment resulting from claims of sleep disorder, sexual dysfunction, and most psychiatric conditions, where those claims are alleged to result from an underlying physical injury.[56] However, the employee is still entitled to receive medical treatment and temporary disability for these types of compensable consequence claims.

Injuries at Home

Under certain circumstances, workers' compensation may cover injuries incurred outside the workplace, even in an employee's home.

In *Kidwell v. WCAB*, a California Court of Appeal ruled that an employee injured at home while performing a task that was a reasonable expectancy of his/her employment was entitled to workers' compensation benefits. The employee worked for the California Highway Patrol. She was required to pass an annual physical fitness test, including a standing long jump, to remain employed. She was injured while practicing at home, requiring surgery and time away from work. The court reasoned that because the long jump was a job requirement and practice was the only way to perfect it, it was a reasonable expectation of employment that the long jump be practiced at home.[57]

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[53] *Escobedo v. Marshalls*, 70 Cal. Comp. Cases 604 (Appeals Board en banc opinion) (2005)

[54] *Laines v. WCAB*, 48 Cal.App.3d 872 (1975)

[55] *Weber v. United Parcel Service, Inc.*, 107 Cal. App. 4th 801 (2003)

[56] Lab. Code sec. 4660.1(c)(1)

This case emphasizes the need for your employee handbook to include a warning that participation in off-duty recreational, social or athletic activities that are not part of the employee's work-related duties is not covered by workers' compensation. If you require employees to pass skill and agility tests, consider providing specific, supervised time for training for those tests.

Injuries Caused by Employee Misconduct

Labor Code sections 4551 and 4552 provide for a 50 percent reduction in benefits if the WCAB finds that the employee's serious and willful misconduct caused the injury. However, there are exceptions to this reduction in benefits:

- The injury resulted in death or permanent disability of 70 percent or more.
- The injury was caused by the employer's failure to comply with any provision of law or any safety order of the Division of Occupational Safety and Health (DOSH).
- The injured employee was less than 16 years old at the time of injury.
- Performance of a duty in an unauthorized, negligent or reckless manner may constitute serious and willful conduct on the part of the employee.[58] However, no reported case has ever applied a reduction in benefits against an employee.

Injuries Caused by Employer Misconduct

Labor Code sections 4553 and 4553.1 provide for a 50 percent increase in benefits, together with costs and expenses not to exceed $250 in situations where the employee is injured by serious and willful misconduct.

To prove a claim of serious and willful misconduct, the employee must show an intentional act, or an intentional failure to act, with knowledge that serious injury is a probable result, or with an active disregard for the consequences:

- On the part of the employer or his/her managing representative.
- If the employer is a partnership, on the part of one of the partners, its managing representative or general superintendent.
- If the employer is a corporation, on the part of an executive, managing officer or its general superintendent.

A California court ruled that simple or even gross negligence on the part of the employer is not sufficient.[59] In another case, a California court ruled that an employer must have been fully aware of the existence of the danger (perhaps though a safety ordinance, past accidents or from the advice of others) and purposefully ignored it.[60]

To support a holding of an employer's serious and willful misconduct based on violation of a safety order, the WCAB must find all of the following:

- The specific manner in which the order was violated

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[57] *Kidwell v. WCAB*, 33 Cal. App. 4th 1130 (1995)

[58] *Pacific Tel. & Tel. Co. v. WCAB*, 112 Cal. App. 3d 241 (1980)

[59] *Johns-Manville Sales v. WCAB*, 96 Cal. App. 3d 923 (1979)

[60] *Bekins Moving & Storage Co. v. WCAB*, 103 Cal. App. 3d 675 (1980)

- That violating the safety order caused the injury or death
- The specific manner in which the violation caused the injury or death
- That the safety order and its applicability were known to and violated by a specific named person for whom the employer is accountable, or that the condition was obvious and created a probability of serious injury
- That the failure of the employer or its representative to correct the condition constituted a reckless disregard for the probable consequences

Your insurance carrier is prohibited by law from insuring this liability.[61] This means that you are responsible for paying any liability due to serious and willful misconduct.

Multiple Injuries and Apportionment

Some workers may suffer multiple workplace injuries over the course of a career. Workers' compensation law holds employers liable only for the portion of an employee's disability that was directly caused by the current work-related injury. A physician must determine the approximate percentage of the disability that is due to the current job-related injury. That percentage determines the amount for which the current employer is liable.

Generally, the concept of medical apportionment assigns a percentage of an employee's impairment to the work itself and the remaining percentage to outside factors.

A California Supreme Court ruling confirms the proper calculation of a workers' compensation permanent disability award for employees who suffer multiple injuries. The California Supreme Court, in *Brodie v. WCAB*, clarified conflicting court opinions when the employee's overall disability is subject to apportionment.[62]

After reviewing legislative history and cases analyzing this issue, the court rejected findings in prior cases that used different formulas and approved the formula that was used in *Fuentes v. WCAB.*[63] The Supreme Court ruling requires the calculation of apportionment to begin with the overall percentage of permanent disability and then subtract the non-compensable percentage of permanent disability (e.g., the percentage of the disability that is attributable to a previous injury).

Brodie ensures that employers only bear liability for the percentage of permanent disability that was directly caused by the current work-related injury. Employees with pre-existing conditions or prior industrial injuries should only receive workers' compensation in an amount commensurate with the injury that has just occurred.

Workers' Compensation Exceptions for Emergency Personnel

Generally, the concept of medical apportionment assigns a percentage of a work-related injury to the work itself and the remaining percentage to outside factors. Workers' compensation law exempts some peace officers, firefighters and other safety personnel from medical apportionment of the causes of certain diseases, including:

- Pneumonia
- Hernias

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[61] Ins. Code sec. 11661

[62] *Brodie v. WCAB*, 40 Cal. 4th 1313 (2007)

[63] *Fuentes v. WCAB*, 16 Cal. 3d 1 (1976)

- Heart disease
- Cancer
- Tuberculosis
- Blood-borne diseases
- Other afflictions in workers' compensation cases where the law provides for disputable presumption that the cause is work related[64]

If a qualifying peace officer, firefighter or other safety personnel experiences one of these illnesses or injuries as a result of his/her employment, workers' compensation fully covers that illness or injury without apportionment.

Death Benefits

Where the death of an employee results from an industrial injury, death benefits are payable to the qualifying dependents.[65] The claim must be filed within 240 weeks of the date of injury, regardless of the date of death.[66] The amount payable is based on the number of dependents and the level of dependency.[67] A burial benefit is also payable.[68]

For dependents of safety officers injured during active service, the deadline to file a claim is extended to 420 weeks of the date of injury, and within one year of the date of death, provided that death is due to cancer, tuberculosis, methicillin-resistant Staphylococcus aureus skin infections or blood borne infectious diseases.[69]

Additional death benefits are available to the totally dependent minor children of the deceased employee, until the youngest child reaches the age of 18 years old.[70]

For injuries on or after January 1, 2014, this continuing benefit is payable to the totally dependent minor child regardless of whether there is a surviving parent who is also a total dependent.[71]

If an active member of a police or fire department is killed in the performance of duty, benefits continue until his/her youngest child is 19 years old, if the child is still attending high school. The benefit continuation does not apply to children of employees whose principal duties were clerical or otherwise do not fall within the scope of active law enforcement or fire fighting services.[72]

Stress-Related Injuries

In California, an industrial injury does not have to be a physical injury, like a broken arm. It can also be an emotional injury due to stress or trauma caused by the employment.

Example: In a typical case, an employee claimed that he was subjected to a campaign of harassment by his supervisor, eventually resulting in his wrongful termination. The employee sued in civil court, but the California Supreme Court ruled that his only available remedy was in workers' compensation.[73]

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[64] Lab. Code secs. 3212, etc.

[65] Lab. Code sec. 4700 et seq.

[66] Lab. Code sec. 5406

[67] Lab. Code sec. 4702

[68] Lab. Code sec. 4701(a)

[69] Lab. Code sec. 5406.7 (effective January 1, 2015)

[70] Lab. Code sec. 4703.5(a)

[71] Lab. Code sec. 3501(a) as amended October 13, 2013

[72] Lab. Code sec. 4703.5(b)

Claims of psychiatric injury can be mysterious and difficult to disprove. There is no way to objectively verify the existence of a psychiatric injury, which can result in fraudulent or exaggerated claims. For these reasons, California has taken steps over the last 20 years to enact higher thresholds of compensability for claims of psychiatric injury.

To receive workers' compensation benefits for a work-related psychiatric or stress injury, an employee must show that the work-related stress was the predominant cause of the psychiatric injury.[74] More than 50 percent of the employee's stress must come from actual events of his/her work, rather than from problems with the employee's family, health or other concerns.

Example: Where an employee alleged psychiatric injury due to allegations of misappropriation of funds, an investigation by a grand jury regarding her fund raising activities, press coverage of the investigation, and a defamatory e-mail sent by another teacher to all district employees, her psychiatric injury was held to be caused by actual events of the workplace and compensable.[75]

Example: Courts no longer accept the employee's honest misperception of events as being causative of a psychiatric injury. Where an employee engaged in abusive conduct toward her co-workers which resulted in the co-workers' disdainful reactions toward her, such reactions were not "actual events" of the workplace nor did they constitute the predominant cause of the employee's psychiatric injury, where the predominant cause of the psychiatric injury was the employee's own intentional abuse of her co-workers.[76]

Example: An employee claimed that her physical injury caused her to become depressed, even though she had numerous non-industrial stress factors that also played a role in causing her depression. She contended that because her physical injury was admitted and because it was not disputed that the physical injury did cause some of her emotional problems, all of her psychiatric injury should be automatically compensable. The appellate court ruled that a psychiatric injury that resulted from a physical industrial injury is compensable only if it is more than 50 percent attributable to the physical industrial injury.[77]

Typically, a worker must have been employed at least six months to claim mental stress injuries. However, this rule does not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition.[78]

To obtain compensation for a psychiatric or stress injury, the employee must show:

- Diagnosis as a mental disorder based on accepted and published terminology and criteria of the American Psychiatric Association.
- Medical determination that the mental disorder results in disability or requires medical treatment.
- Proof that actual events of employment predominantly caused the psychiatric injury, unless the psychiatric injury was a result of a significant violent act. If a significant violent act occurred, the working conditions must account for at least 35 to 40 percent of the causation of the injury.[79]

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[73] *Livitsanos v. Superior Court*, 2 Cal. 4th 744 (1992)

[74] Lab. Code sec. 3208.3

[75] *Merced City School District v. WCAB (Delgado)*, 73 Cal. Comp. Cases 1115 (2008)

[76] *Verga v. WCAB*, 159 Cal. App. 4th 174 (2008)

[77] *Lockheed Martin Corp. v. WCAB*, 96 Cal.App.4th 1237 (2002)

[78] Lab. Code sec. 3208.3(d)

[79] Lab. Code sec. 3208.3(b)

In *Sonoma State University v. WCAB*, the WCAB awarded workers' compensation benefits to an employee with multiple disorders. Work had caused 100 percent of one of the disorders, but only 35 percent of another. A court of appeal reversed the decision, stating that if an employee suffers from psychiatric injury that results from multiple disorders, work-related causes must be the predominant cause of the psychiatric injuries as a whole.[80]

For injuries on or after January 1, 2013, SB 863 eliminated compensation for permanent impairment resulting from claims of sleep disorder, sexual dysfunction, and most psychiatric conditions where those claims are alleged to result from an underlying physical injury.[81] Temporary disability and medical treatment must still be provided for the consequential psychiatric claim. There are exceptions for significant violent acts or catastrophic physical injuries (e.g., loss of a limb, paralysis, severe burns, severe head injuries).[82]

Defending Against Claims of Stress-Related Injuries

You can raise defenses against claims of stress-related injuries:

- The passive stage defense — the employee's duties or his/her work environment did not contribute to the mental or emotional condition. They merely provided a passive stage for the non-industrial mental or emotional condition to become disabling.
  - For example, in *Atascadero Unified School District v. WCAB*, a court ruled that stress arising out of workplace gossip about an extramarital affair does not qualify for workers' compensation even though the affair involved a co-worker. The court found that an abusive marriage and a divorce caused the stress. The extramarital affair played only a small part and the injury occurred at the workplace merely by chance. The job did not put the employee in a dangerous position; it provided only a location for the gossip.[83]
- The after-the-fact rationalization defense — the employee's work environment was an after-the-fact rationalization for a mental disorder that was caused by non-industrial factors.
  - For example, where contemporaneous medical evidence demonstrated that causation of an employee's psychiatric symptoms was attributable to nonindustrial factors, the court held that the employee's testimony about personnel changes, heavy workload and an inability to keep pace was actually an after-the-fact rationalization.[84]

You can use these additional statutory defenses against compensation for psychiatric injuries:

- Mental stress claims are generally not compensable unless you have employed the employee for at least six months. The purpose of this rule is to prevent fraudulent or retaliatory claims. The six months of employment need not be continuous, and can continue to accumulate even after the underlying physical injury occurs if the employee returns to work.[85]
- An important exception to the "six-month" rule is where mental or emotional stress was caused by a sudden and extraordinary condition.[86] Courts have held that "sudden and extraordinary" work events might include gas main explosions or workplace violence: "the type of events which would naturally be expected to cause psychic disturbances in even a diligent and honest employee."[87]

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[80] *Sonoma State University v. WCAB*, 142 Cal.App.4th 500 (2006)

[81] Lab. Code sec. 4660.1(c)(1)

[82] Lab. Code sec. 4660.1(c)(2)

[83] *Atascadero Unified School District v. WCAB*, 98 Cal. App. 4th 880 (2002)

[84] *Barnes v. WCAB*, 62 Cal. Comp. Cases 489 (1997) (writ denied)

[85] Lab. Code sec. 3208.3(d); *Gottschalks Department Stores v. WCAB (Garcia)*, 63 Cal. Comp. Cases 315 (1998) (writ denied)

[86] Lab. Code sec. 3208.3

[87] *Wal-Mart v. WCAB*, 112 Cal.App.4th 1435 (2003)

- Stress claims are not compensable if they result from lawful, non-discriminatory good-faith personnel actions, including discipline, work evaluation, transfer, demotion, layoff or termination.[88] For more information, see "“Good Faith Personnel Action” Defense" on page 676.
- Psychiatric claims filed after the employee was given notice of termination or layoff are generally not compensable.[89]
- Psychiatric injuries caused by the stress of litigating a workers' compensation claim are also not compensable.[90]

"Good Faith Personnel Action" Defense

Stress or psychiatric injuries that are substantially caused by lawful, nondiscriminatory good faith personnel actions are not compensable.[91]

For purposes of this defense, the employer must prove that at least 35 percent to 40 percent of the psychiatric injury was caused by the personnel action. A physician must determine the approximate percentage of causation from each causative factor; only the trial judge can determine whether the factors were lawful and nondiscriminatory, and whether the causative factors were "personnel actions."[92]

The WCAB has defined a "personnel action" as conduct either by or attributable to management (including those who have the authority to review, criticize, demote, or discipline an employee). It is not necessary for the personnel action to have a direct or immediate effect on the employment status. Personnel actions may include but are not necessarily limited to transfers, demotions, layoffs, performance evaluations, and disciplinary actions such as warnings, suspensions, and terminations of employment.[93]

> **Example:** A school teacher was entitled to workers' compensation for a psychiatric injury where the evidence showed that 15 percent of her injury was caused by non-industrial factors, 51 percent by her activities as a classroom teacher, and 34 percent by the lawful, non-discriminatory, good faith personnel actions of the school principal. In order to use the defense, the law requires that the personnel action must be a substantial cause of the psychiatric injury "from all sources combined," including non-industrial factors. Because only 34 percent of all sources that combined to cause the psychiatric injury were due to the good faith personnel actions, the injury was found to be compensable.[94]

A California Court of Appeal ruled that the good faith personnel action defense extends to work-related stress injuries that manifest themselves in physical symptoms, such as gastrointestinal problems or headaches.[95]

The court concluded that section 3208.3(h) precludes recovery for physical manifestations, migraines in this case, which "are directly and solely resulting from the psychological injury suffered as a result of good faith personnel actions." To hold otherwise, according to the court, would undermine the intent of the law to limit stress claims because of their potential for fraud and abuse.

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[88] Lab. Code sec. 3208.3 (h)

[89] Lab. Code sec. 3208.3

[90] *Brock v. WCAB*, 64 Cal. Comp. Cases 86 (1999) (writ denied)

[91] Lab. Code 3208.3(h)

[92] *Rolda v. Pitney Bowes*, 66 Cal. Comp. Cases 241 (2001) (en banc)

[93] *Larch v. Contra Costa County*, 63 Cal. Comp. Cases 831 (1998) (Significant Panel Decision)

[94] *San Francisco Unified School District v. WCAB (Cardozo)*, 190 Cal. App. 4th 1 (2010)

[95] *County of San Bernardino v. Workers' Compensation Appeals Board*, 203 Cal. App. 4th 1469 (2012)

The court emphasized that its decision is limited to cases where there is no evidence the employee suffered on-the-job stress apart from that caused by the good faith personnel action. If the work stress and its related physical symptoms are caused by bad faith actions, such as outrageous, objectively unreasonable conduct on the part of a manager, those injuries would still be compensable.

Employer Notice Obligations

You must provide your employees with written notice about their workers' compensation rights. You must present the following posters and notices to your employees:

- You must post an informational poster in a conspicuous location frequented by employees.
- You must give a workers' compensation Rights and Benefits pamphlet to each employee when he/she is hired.
- When an employee is injured as the result of a crime, you must give him/her a notice for crime victims.

To order updated posters, forms and pamphlets for 2016, visit the CalChamber store at store.calchamber.com.

Workers' Compensation Poster and MPN Posting

You must display in an area accessible to all employees an informational poster that details their workers' compensation rights, *Notice to Employees-Injuries Caused By Work*. If you have Spanish-speaking employees you must provide the notice in both English and Spanish. Employers can obtain this poster from the Division of Workers' Compensation website at www.dir.ca.gov/dwc.

ew 2016

The Division of Workers' Compensation updated regulations relating to the required workers' compensation poster and to the *DWC-1 Claim Form* for 2016.

This updated mandatory notice is also part of CalChamber's all-in-one ***2016 California and Federal Employment Notices Poster***, available in English or Spanish, from the CalChamber store at store.calchamber.com. It contains legally required updates approved by the Division of Workers' Compensation.

If an employer uses Medical Provider Networks (MPN), the complete written MPN employee notification must be posted in both English and Spanish in a conspicuous location frequented by employees during the hours of the workday and next to the workers' compensation posting.

You must give a complete written MPN employee notification about coverage under the MPN to employees at the time of hire, at the time of injury, or when an employee with an existing injury begins treatment under the MPN. The insurer or the employer must notify an injured employee of his or her right to be treated by a physician of his or her choice within the MPN after the first visit with the MPN physician and the method by which the list of participating providers may be accessed by the employee.

The California Supreme Court has ruled that an injured employee may receive treatment within the MPN, paid for by the industrial insurance carrier. However, the injured employee may nonetheless obtain treatment outside the MPN on a private-pay basis. Reports obtained outside the MPN may not be the only evidence to support an award of benefits, and such reports are not admissible to resolve disputes over diagnosis and treatment within an MPN.[96]

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[96] *Valdez v. WCAB*, 57 Cal.4th 1231 (2013)

Since 2014, MPN regulations include:

- A streamlined process that allows for electronic submission of MPN applications, modifications and renewals, and allows employers to distribute MPN notices electronically to all covered employees
- A provision that MPNs are approved for a period of four years
- A requirement that employers include an MPN contact email address in notices
- A requirement that the MPN maintain appropriate access standards by having at least three physicians who can treat common injuries available within three business days (20 business days for a specialist) and within 30 miles of the employee's residence or workplace, or permit out-of-network treatment
- A requirement that a Medical Access Assistant (or designated claims adjuster) be located in the United States and available at a toll-free number Monday to Saturday, 7 a.m. to 8 p.m. to provide employee assistance with access to medical care, including, but not limited to, contacting provider offices during regular business hours and scheduling medical appointments for covered employees
- A requirement that MPN physicians affirmatively acknowledge in writing their agreement to participate in the MPN, and a streamlined process for obtaining such acknowledgments
- If an employee who is required to obtain treatment within an MPN nevertheless chooses to obtain treatment outside the MPN, the employer is not liable for the treatment costs; where an employee permissibly obtains treatment outside the MPN, the non-MPN physician must immediately notify the employer at the time treatment commences
- An oversight provision that outlines the mechanism for a formal complaint, including a new complaint form, and provides procedures by which an MPN may be subject to probation, suspension or revocation, or assessed administrative penalties.

Penalties for Failing to Post Workers' Compensation Notice

Failing to post the required workers' compensation notice is a misdemeanor and automatically constitutes *prima facie* evidence of noninsurance.[97] Failure to post also may permit the employee to be treated by his/her own physician for an injury that occurs during the period that the notice was not posted.[98]

Failure to post MPN notification or provide notice of the existence of the MPN shall not be a basis for an employee treating outside of an MPN, unless it is shown that the failure to provide notice "resulted in the denial of medical care."[99] It is unclear, at this time, how the phrase "resulted in the denial of medical care" will be defined by the courts.

Under Labor Code section 3550(e), if an employer fails to post a notice regarding workers' compensation coverage, benefits and procedures, an injured worker may obtain medical treatment from a personal physician regardless of whether the personal physician was predesignated.

CalChamber created a ***Required Notices Kit*** that contains the required postings and pamphlets, including the updated DWC-approved workers' compensation poster. To order a ***Required Notices Kit***, call (800) 331-8877 or visit the CalChamber store at store.calchamber.com.

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[97] Lab. Code sec. 3550(a)

[98] Lab. Code sec. 3550

[99] Lab. Code sec. 4616.3(b)

Workers' Compensation Pamphlet

You must give a workers' compensation pamphlet to all new employees. This pamphlet informs your employees of their rights and obligations regarding workers' compensation. This pamphlet is in addition to the required poster discussed in "Employer Notice Obligations" on page 677.

Give a workers' compensation pamphlet to each new employee at the time he/she is hired or by the end of the first pay period. In addition to the information contained in the poster, this pamphlet must include:

- General information on obtaining medical care for an on-the-job injury.
- Information on the role and function of the primary treating physician.
- A written statement that the employee can designate his/her own personal physician or personal chiropractor as the primary treating physician.

If your employee designates a personal physician or personal chiropractor, you should retain the completed designation forms and forward a copy to your workers' compensation insurance carrier.

The content in the workers' compensation pamphlet changes frequently. Be sure your pamphlet stays current.

Personal Chiropractor or Acupuncturist Designation Form

Personal Chiropractor or Acupuncturist Designation Form - Spanish

Spanish-Speaking Employees

If you have Spanish-speaking employees, you are required to post the notice in both English and Spanish, and you are required to provide the pamphlet in both English and Spanish.

The poster is on the ***2016 California and Federal Employment Notices Poster***. You can obtain the pamphlet from the CalChamber store at store.calchamber.com.

Written Notice for Crime Victims

When an employee is a victim of a crime at his/her workplace, you must give that employee written notice that he/she is eligible for workers' compensation benefits for resulting injuries, including psychiatric injuries.

Provide a written notice, either personally or by First-Class Mail, within one day of the crime or within one day of the date that you reasonably could have known of the crime.

Workers Compensation Benefits for Victims of Workplace Violence

Medical Treatment Rights and Obligations

One of the primary benefits provided for workers' compensation injuries is the right to medical treatment. The employer must provide all reasonable treatment related to the injury that is necessary to cure or relieve the effects of the industrial injury.[100]

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[100] Lab. Code sec. 4600(a)

Because you are empowered to select the medical provider under some circumstances, it is important that you are familiar with your role in this process.

Predesignating a Personal Physician, Chiropractor or Acupuncturist

Each employee has a right to designate a personal physician as well as a personal chiropractor and a personal acupuncturist. If an injury occurs, the predesignated physician becomes the medical provider for injury-related treatment.

New 2016 Otherwise, the employer has the right to control medical treatment for the first 30 days after an injury. During the first 30 days, the employee may make a one-time request for a change of physician. After the first 30 days, the employee may choose his/her own treatment provider, subject to any applicable MPN.

Designating a Physician

Although employees have the right to notify you that they have a personal medical physician (M.D.), Doctor of Osteopathic Medicine (D.O.) or medical group, specific rules govern this predesignation.

Employees may make a valid physician predesignation only if:

- The employee has healthcare coverage for injuries or illnesses that are not work related.
- The physician is the employee's regular physician, who limits his/her practice of medicine to general practice or is a board-certified or board-eligible internist, pediatrician, obstetrician/gynecologist or family practitioner. In addition, the physician has previously directed the employee's medical treatment and retains the employee's medical records.
- Prior to the injury, the employee's physician agrees to treat him/her for work injuries or illnesses.
- Prior to the injury, the employee provided you the following information in writing:
  - Notice that the employee wants his/her personal physician to treat him/her for a work-related injury or illness.
  - The employee's personal physician's name and business address.

New 2016 California law contains expanded rights to predesignation. Previously, predesignation was permitted only if the *employer* provided regular health care insurance to its employees. Labor Code section 4600(d) was amended to allow the employee to predesignate as long as the employee has *any* group health insurance plan, fund or policy (such as a spouse's policy), as described in Labor Code section 4616.7.

Also, the employee can predesignate a medical group, corporation, partnership or association of licensed physicians of medicine or osteopathy as a primary treating physician for workers' compensation treatment purposes. The group must be an integrated, multi-specialty medical group that provides comprehensive medical services predominantly for nonoccupational illnesses and injuries.

You must notify employees of the right to predesignate a personal physician. You must provide new employees with a physician predesignation form when you hire them or by the end of the first pay period. Employees who have properly predesignated a personal physician are entitled to be treated by that physician even if the employee would otherwise be treated within an MPN.

If emergency or first aid treatment is required, you must provide it. However, employees can obtain follow-up treatment with their predesignated personal physicians.

Personal Physician Designation Form

Personal Physician Designation Form — Spanish

Under Labor Code section 3550(e), if an employer fails to post a notice regarding workers' compensation coverage, benefits and procedures, an injured worker may obtain medical treatment from a personal physician regardless of whether the personal physician was predesignated.

See "Penalties for Failing to Post Workers' Compensation Notice" on page 678" for more information.

Designating a Chiropractor or Acupuncturist

If your employees are not governed by an MPN, you must provide your employees with a form that allows them to predesignate a chiropractor or acupuncturist when you hire them or by the end of the first pay period. The employee must have filled out and returned the form to you prior to the injury.

The chiropractor or acupuncturist must be the employee's regular chiropractor or acupuncturist. He/she must have previously directed the employee's treatment. He/she must also retain the employee's treatment records and history. The chiropractor or acupuncturist must be licensed under the Business and Professions Code. The chiropractor or acupuncturist need not agree to treat the employee for work-related injuries before the predesignation.

An employee can predesignate a personal chiropractor and/or personal acupuncturist, but cannot insist on being initially treated by that practitioner. For the first 30 days following an injury, you have the right to refer the employee to your physician or to the employee's predesignated personal physician first. After the initial visit, the employee can request that further treatment be provided by his/her predesignated personal chiropractor or acupuncturist.

For injuries after January 1, 2004, the personal chiropractor may be designated as the treating physician for a maximum of 24 visits per injury, unless additional visits are authorized in writing.[101] After that, the employee must choose a non-chiropractic treating physician.

Personal Chiropractor or Acupuncturist Designation Form

Personal Chiropractor or Acupuncturist Designation Form - Spanish

Change of Physician

An employee may request a change of physician at any time.[102] You must provide an alternative physician within five days of the request.

If an employee requesting a change of physician notifies you in writing prior to the date of injury that he/she has a personal chiropractor or personal acupuncturist, the alternative physician you provide must be the employee's personal chiropractor or acupuncturist.

Mandatory Utilization Review, Independent Medical Review and the Appeal Process

Every employer must establish a utilization review process. The utilization review process is the process by which the employer or other entity reviews and approves, modifies, delays or denies physician requests before, during or after providing medical treatment services. Utilization reviews can occur before, during or after medical treatment to determine if the treatment is warranted. Treatment can be modified, delayed or denied based on the results of the review.[103] The utilization review decision is valid for 12 months.[104]

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[101] Lab. Code sec. 4600(c)

[102] Lab. Code sec. 4601

[103] Lab. Code sec. 4610

You can establish the utilization review process directly through your insurer or through an entity with which you or your insurer contracts for utilization review services.

Written policies and procedures must govern the utilization review process. Decisions based on the medical necessity of the proposed treatment services must be consistent with the DWC's schedule for medical treatment utilization. Utilization review is not required for treatment disputes where the claim has been denied, or where the treatment is for a body part or condition that is not part of an accepted claim.[105]

You must file the utilization review policies and procedures, as well as a description of the utilization process, with the administrative director. Upon request, you must disclose this information to employees, physicians and the public.

To oversee the utilization review process, an employer, insurer or other entity must employ or designate a medical director who holds an unrestricted license to practice medicine in California. The medical director must ensure that the utilization review process complies with Labor Code section 4610.

Every employer, insurer or other entity must maintain telephone access for physicians to request authorization for health care services.

The utilization review process must comply with specific time frames to ensure that injured employees are treated properly. If the administrative director determines that the employer, insurer or other entity failed to meet any of the time frames in Labor Code section 4610 (g), by order, the administrative director can assess administrative penalties for each failure.

Independent Medical Review and the Appeal Process

The utilization review (UR) process is supplemented by an appeals process called Independent Medical Review (IMR). Jurisdiction over medical treatment disputes has been taken away from the appeals board and moved over to the IMR process. This process applies to all injuries after January 1, 2013, and all utilization review decisions after July 1, 2013. If the UR process is completed in a timely manner, IMR is the exclusive avenue for the employee to appeal a denial or modification of treatment for all injuries.[106]

New 2016

Under IMR, your claims examiner will attach a completed appeal form to the UR denial or modification. The employee has 30 days in which to file the appeal along with any other relevant information.[107]

After the assignment of an anonymous, independent reviewer, the claims examiner has 10 days to provide copies of the medical documentation.[108] The decision of medical necessity is made within 30 days (earlier deadlines are applicable for emergency treatment). Further appeal can be made to the WCAB, but only on limited issues (e.g., fraud, bias, clear error); the finding of medical necessity cannot be disturbed on appeal.[109]

The purpose behind the implementation of both UR and IMR was to remove determinations of medical necessity from the WCAB and leave it to medical professionals to decide whether a treatment is required.

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[104] Lab. Code sec. 4610(g)(6)

[105] Lab. Code sec. 4610(g)(7)

[106] Lab. Code sec. 4610.5(a)

[107] Lab. Code sec. 4610.5(h)(1)

[108] Lab. Code sec. 4610.5(l)

[109] Lab. Code sec. 4610.6(h)

However, the case of *Dubon v. World Restoration* has created an exception to this rule if the UR process is "untimely." Under that circumstance, *Dubon* allows the judge to rule on the question of medical necessity but the injured worker still has the burden to prove that the disputed treatment is required.[110]

If the UR process is timely but there are other defects, the employee's only remedy is through IMR. The Appeals Board has issued conflicting decisions regarding the validity of an untimely IMR process, and this issue will be determined by later court decisions.[111]

Independent Bill Review

In an effort to eliminate uncertainty and conflict associated with payment of medical bills, reform legislation was enacted to change bill payment procedures and establish an independent bill review to resolve billing disputes. The independent bill review process was intended to eliminate most future liens. Beginning January 1, 2013, if a medical treatment provider disputes the amount of reimbursement received from the insurance carrier, the dispute must go through Independent Bill Review (IBR). The IBR decision is final and binding on both parties.

What To Do When an Injury Occurs

You must take several steps in response to a reported illness or injury on the job. This section discusses each step.

1. Provide immediate medical care. You must provide emergency medical care for all work-related injuries.
2. If an incident results in a serious injury or death, you must report it within eight hours by telephone or fax to the California Division of Occupational Safety and Health (Cal/OSHA). A form is available online at www.dir.ca.gov/DOSH/WebComplaintForm.pdf.
3. Notify the employee's emergency contacts if the employee is unable to do so.
4. If the illness or injury will result in time lost beyond the date of the illness or injury, or results in medical treatment beyond first aid, provide the employee with the *Workers Compensation Claim Form - DWC 1*.

Workers Compensation Claim Form - DWC 1

5. Prepare your reports.
6. Designate the time off under the Family and Medical Leave Act (FMLA) or California Family Rights Act (CFRA), if applicable. FMLA/CFRA gives the employee up to 12 weeks of continued health benefits. Workers' compensation insurance covers the medical costs of the workplace injury only. For more information, see "FMLA and CFRA Qualifying Reasons" in Chapter 18, page 472.
7. Communicate with the employee on a regular basis to make sure that he/she receives medical treatment and the required benefit payments in a timely manner.
8. Review the *Form 5021 - Doctor's First Report of Occupational Injury or Illness*. Note the following:
   - The employee's written description of how the injury or illness occurred to help you investigate the claim and/or the reason for the injury or illness.

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[110] *Dubon v. World Restoration* (10/06/2014) 79 Cal. Comp Cases -- (Appeals Board en banc)

[111] Compare *Arredondo v. Tri-Modal* (IMR timeframes are not mandatory) and *Saunders v. Loma Linda* (untimely IMR is invalid)

- Whether the treatment went beyond first aid. If it did, you must provide the employee with *Workers Compensation Claim Form - DWC 1*. You must complete the *Form 5020 - Employer's First Report of Occupational Injury or Illness*. File both forms with your insurance carrier.

Form 5021 - Doctor's First Report of Occupational Injury or Illness

Form 5020 - Employer's First Report of Occupational Injury or Illness

Workers Compensation Claim Form - DWC 1

- The employee's ability to return to his/her regular job or modified duty. A return to full duty or modified duty reduces the payments that the workers' compensation carrier makes to the employee and reduces the impact on your future insurance premiums.

9. Investigate the accident, identifying the cause and preventative action(s) that will avoid recurrence. Your Cal/OSHA-mandated Injury and Illness Prevention Program (IIPP) requires that you investigate each accident. Document the investigation.

10. Prepare any required Cal/OSHA records, such as:
    - *Injury and Illness Incident Report*
    - *Work-Related Injuries and Illnesses Log - Form 300*
    - *Summary of Work-Related Injuries and Illnesses - Form 300A*
    - Use the *OSHA Log 300 - Guidelines for Determining Recordability* to determine what you must record. The *Optional Worksheet to Help You Fill Out the Annual Summary - Form 300A* can help you complete Form 300A.
    - *Workers' Compensation Checklist*

Injury and Illness Incident Report - Form 301

Work-Related Injuries and Illnesses Log - Form 300

Work-Related Injuries and Illnesses Summary - Form 300A

OSHA Log 300 - Guidelines for Determining Recordability

Optional Worksheet to Help You Fill Out the Annual Summary - Form 300A

Workers Compensation Checklist

Provide Medical Care

When a work-related illness or injury occurs, provide emergency medical care when necessary. An employee injured on the job has the right to "medical, surgical, chiropractic, acupuncture, and hospital treatment, including nursing, medicine, medical and surgical supplies, crutches, and apparatuses, including orthotic and prosthetic devices and services, that is reasonably required to cure or relieve the injured worker from the effects of his or her injury."

To meet the obligation to furnish medical care, you or your insurance carrier can designate the physician who provides medical treatment for the first 30 days after an injury. An employee can predesignate a personal physician. If the employee has made a valid predesignation, then the personal physician may immediately assume treatment for a work-related injury.

However, the employee's personal physician can refuse to provide medical treatment because the injury requires a different medical specialty. In this case, the employee should use your designated physician.

Upon an employee's request within the 30-day period, you must allow one change in physician. If the employee has properly predesignated a personal chiropractor or personal acupuncturist, he/she may change to that provider. Otherwise, you maintain control over that choice.

After the 30-day period expires, the employee can select his/her own treating physician when, subject to any applicable MPN. Employees who are covered by an MPN can only request a change of physician within the network.

The employee can predesignate his/her physician for workers' compensation treatment if:

- The employee notified you of the choice in writing before the date of the injury.
- The employee has nonoccupational group health care coverage in a health services plan.
- The physician is the employee's primary care physician or a surgeon holding an M.D. or D.O. (Doctor of Osteopathic Medicine) degree and is licensed under the Business and Professions Code.
- The physician previously directed the employee's treatment and maintains the employee's medical records and medical history.
- The physician agrees to be predesignated as the employee's treating physician for occupational injury or illness.

Give the Employee a Workers' Compensation Claim Form

Give the employee the *Workers' Compensation Claim Form - DWC 1*. You must provide this form if the injury results in medical treatment beyond "first aid" or in any time lost beyond the injury date. You must provide this form within one working day of finding out about the injury or illness. Even if an employee does not complete and return the form, you must report the injury and its surrounding circumstances to the insurance company as soon as possible. The insurance company cannot ignore the provisions governing the timely payment of benefits if a job-related injury occurred.

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The Division of Workers' Compensation updated regulations relating to the required workers' compensation poster and to the *DWC-1 Claim Form* for 2016.

Workers Compensation Claim Form - DWC 1

Under Labor Code section 5405, an employee must file a workers' compensation claim within one year of the injury date. In *Galloway v. WCAB*, a California Court of Appeal ruled that an injured employee whose employer did not inform him of his workers' compensation rights could file a claim past the one-year statute of limitations. In this case, the employer failed to give the employee written notice of his workers' compensation benefits after it learned of the injury.[112]

You or your insurer can delay accepting the claim for up to 90 days while you determine if it is compensable (i.e., it arose out of the employment relationship and occurred in the course of employment). During that time, you must provide medical care for the injured employee. Your liability for medical costs incurred prior to the denial of a claim is limited to $10,000.[113]

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[112] *Galloway v. WCAB*, 63 Cal. App. 4th 880 (1998)

[113] Lab. Code sec. 5402

In *Honeywell v. WCAB*, the California Supreme Court confirmed that the 90-day period for investigating a claim starts from the day an employee turns in a claim form, though the employer or one of its agents may have knowledge of the injury at an earlier date. The employer's negligent failure to provide the claim form delays the start of the 90-day period, but subjects the employer to penalties. Intentional employer misconduct, such as refusing to provide a claim form or misrepresenting the availability of or need for a claim form, starts the 90-day period from the date the employer knew of the injury.[114]

Report the Incident to the Insurance Company

You must file the *Form 5020 - Employer's Report of Occupational Injury or Illness* for every workplace injury which results in either:

- Lost time beyond the day of the incident (employee misses more than one day of work)
- Medical treatment beyond first aid

You must file *Form 5020* as soon as possible, but no later than five days after the employer obtains knowledge of the occupational illness or injury. If you are self-insured, file the form with the Department of Industrial Relations. If you are an insured employer, the report must be filed with the workers' compensation carrier. The insurer must file a copy of the employer's report with the DIR immediately upon receipt.

These requirements are separate from, and in addition to, the requirements related to reporting serious incidents or death (see "Report Serious Incidents or Death" on page 686.

If the employee subsequently dies as a result of the illness or injury, you must send an amended *Form 5020* within five days of learning of the death.

When an employee dies as a result of a workers' compensation illness or injury, you must file a *DIA 510- Notice of Employee Death* with the DWC unless you have actual knowledge that the employee left a surviving minor child.

Form 5020 - Employer's Report of Occupational Injury or Illness

DIA 510 - Notice of Employee Death

Cal/OSHA Record Keeping Obligations

Record keeping for Cal/OSHA compliance is a separate issue from the reports and records you keep for workers' compensation purposes. Recording an incident does not indicate liability in any way. To help identify patterns in your business, you may want to voluntarily record incidents that you are not required to record.

For more information, see "Recording Work-Related Injuries and Illnesses" in Chapter 23, page 613.

Report Serious Incidents or Death

The Labor Code requires that every employer must immediately report by telephone or email any serious injury, illness or death of an employee occurring in a place of employment or in connection with any employment to the nearest district office of the Division of Occupational Safety and Health (DOSH).

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[114] *Honeywell v. WCAB*, 35 Cal. 4th 24 (2005)

For more information, see "Reporting Serious Injury or Death" in Chapter 23, page 611.

Investigate and Take Preventive Measures

Conduct an investigation into the surrounding circumstances and document any findings. You can use information that you obtain through this investigation to prevent similar injuries in the future. Investigations should include interviews with co-workers and other witnesses and securing any circumstantial evidence, including machinery, products, ladders and hand tools that may have been involved in the injury.

Eliminate Workplace Hazards

Take corrective action to eliminate any workplace hazards that may have been discovered as a result of the injury or the investigation.

Communicate With the Employee

Communicate with the employee, focusing on his/her recovery from the injury and return to work. Inform the employee of benefits for which he/she may be eligible and when the benefits or services will be furnished. In addition, ask the employee about relevant circumstances relating to the injury, including the names of witnesses and any suggestions on how the injury could have been prevented.

Privacy of Workers' Compensation Medical Records

Laws that limit the amount and type of medical information that you can receive from claims administrators and physicians can make it difficult for you to administer workers' compensation claims. However, you can create strategies to ensure that you receive enough information to manage claims, while still ensuring compliance with the law and injured employees' medical privacy. Although the preamble to the federal Health Insurance Portability and Accountability Act (HIPAA) excludes workers' compensation, many physicians erroneously believe that HIPAA restrictions apply to workers' compensation cases. For more information, see "Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule" in Chapter 8, page 192.

California employers have a right to know an injured employee's diagnosis and treatment plan, as well as medical information necessary to provide modified work duties (i.e., work restrictions from the treating physician).[115] The information you can obtain depends largely on the disclosure policy established by the physician, insurer, a self-insured's risk management department or third-party administrators.

You are obligated to provide the best quality medical care available under the workers' compensation plan. You are also obligated to return the employee to gainful employment as soon as possible. Medical information that is related to the injury can be disclosed only if necessary to modify an employee's workplace.[116] To declare an employee temporarily totally disabled, the diagnosis must be disclosed. In addition, you are entitled to know any pending or expected disability restrictions in order to make workplace modifications and/or alternative work decisions. Some health care practitioners may be reluctant to disclose sufficient information for you to make an informed decision.

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[115] Lab. Code sec. 3762(c)(1) and (2)

[116] Lab. Code sec. 3762(c)(2)

To receive medical information that is required to manage claims, ask the injured employee to sign a release form authorizing the treating physician to send the information to your workers' compensation coordinator. Labor Code section 3762 specifically prohibits claims administrators from causing to be disclosed medical information that does not affect an employer's premium. However, the law doesn't apply to physicians.

In fact, HIPAA's workers' compensation provisions allow protected health information (PHI) to be disclosed if the protected individual specifically authorizes it. The individual's authorization must contain specific information, including:

- Notice of the individual's right to revoke the authorization in writing
- Notice that providers may require authorization before treatment, payment, enrollment or eligibility for benefits
- Authorization in plain, ordinary language[117]

HIPAA was intentionally designed to ensure that workers' compensation systems would not be adversely affected by a restriction on PHI. HIPAA's Privacy Rule allows PHI to be disclosed to workers' compensation insurers, state administrators and employers to the extent necessary to comply with workers' compensation laws or similar programs.

Some physicians, particularly those who are not experienced in workers' compensation matters, can refuse to release records despite a written release from the employee and will insist on a subpoena. If an employee predesignates a physician, you may want to send the physician a letter advising that the physician is required to disclose medical information that is related to workers' compensation to the claims administrator.

Promote Prompt Claim Closure

The goals of medical treatment are to restore the injured employee's condition to as close to pre-injury function as possible and to return the employee to gainful employment. You, your claims supervisor and the treating physician must try to accomplish these goals as soon as possible, consistent with treatment requirements. Ensure that necessary medical attention is scheduled efficiently and that the employee keeps appointments and follows the physician's instructions. Communicate with your claims supervisor so you are satisfied that the recovery process is moving ahead. If the employee is involved in temporary modified duty, make sure that he/she is not exceeding the limitations to avoid aggravating the injury or prolonging recovery.

Fortunately, most claims close after a brief period of medical treatment, during which the employee is off work or participating in modified duty. These claims involve injury with no long-term impact on the employee's health or physical condition.

Some claims involve more serious injury or chronic conditions that may never be fully reversed. At some point, the evaluating medical authorities may determine that the employee's condition will not likely get better or worse. This is known as a "permanent and stationary" condition, or "P&S." It may also be referred to as "Maximum Medical Improvement" (MMI).

At this point, determinations are made as to:

- The extent of any permanent disability
- The need for continuing medical treatment
- The ability to return to work

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[117] 45 CFR sec. 164.508

- The need to modify the employee's regular job

If the injured employee is declared P&S or MMI at the earliest appropriate point in the treatment and recovery process, you avoid long periods of temporary disability payments.

If the limitations permit the employee to return to the pre-injury job, promptly make arrangements for him/her to do so.

Returning Permanent and Stationary Employees to Work

An employee declared P&S may be capable of returning to his/her pre-injury job without limitation. You, the treating physician and, in some cases, your company doctor determine if the employee can perform the job's pre-injury essential functions with or without reasonable accommodations. Make sure that the medical authorities understand the job's essential functions and the extent to which any necessary accommodations can reasonably be made. Involve your company physician when privacy concerns require detailed consideration of the employee's condition and recovery.

The consultation will result in one of four outcomes:

- The employee returns to regular, pre-injury duties without change in duties or conditions of employment — "regular work."
- The employee returns to regular, pre-injury duties as modified to accommodate his/her disability — a "modified position."
- The employee returns to a different position for which he/she is qualified within the limitations of the disability — an "alternative position."
- The employee is declared unable to return to a position within the company and is eligible for retraining benefits.

When you receive notice of the employee's P&S status, take the following steps:

1. Immediately contact the employee or the treating physician to review any identified limitations. Determine whether the pre-injury job can be reasonably modified to accommodate the medical limitations.
2. Identify any other available jobs that the employee could perform within those limitations. Discuss these jobs with:
    - Your employee
    - The treating physician
    - Your organization physician
    - Your claims supervisor
3. Document your efforts. Keep meeting notes. Also, keep copies of job postings, job descriptions under consideration and written proposals and responses that were made during the meetings.

    This documentation helps you defend any discrimination claim made under Labor Code section 132a or disability discrimination claims under either the ADA or FEHA.

4. Decide if you will offer the employee a modified or alternative position. Finalize the position's details.

5. Coordinate with your insurer, who then documents and makes the formal offer, as required by law.

There is a time limit of 60 days from P&S status for you to make an offer. The employee can take 30 days to accept or reject your offer. If the employee fails to respond within that period or rejects the offer, you probably aren't required to reinstate the employee and you may also be eligible for a discount in the indemnity benefits paid to the injured worker (the discount applies only to injuries between January 1, 2005, and December 31, 2012).[118]

Offering a Modified or Alternate Position

A modified position is the employee's former position modified to permit the employee to work within the work restrictions. The modified position must last at least 12 months, pay at least 85 percent of the wages and benefits as the employee's former position and be located within a reasonable distance from the employee's residence at the time of the injury.[119]

In *Raine v. City of Burbank*, a California Court of Appeal addressed the question of whether an employer who provides an employee a temporary, light-duty position for an extended period to accommodate the employee's injury also bears an obligation under the Fair Employment and Housing Act (FEHA) to make that position available indefinitely after the employee's temporary disability becomes permanent.

The court agreed with the decisions of federal circuit courts of appeals under the Americans with Disabilities Act (ADA). The court ruled that the duty to provide reasonable accommodation for a disabled employee does not obligate an employer to convert a temporary, light-duty position to a permanent one when doing so would create a new position.[120]

To make a return to work offer, you must use the *Notice of Offer of Regular, Modified or Alternative Work for Injuries Occurring on or after 01/01/13 - DWC-AD 10133.35*.

Notice of Offer of Regular, Modified or Alternative Work for Injuries Occurring on or after 01/01/13 - DWC-AD 10133.35

The following forms may be used to assist in the reasonable accommodation process:

Reasonable Accommodation and Interactive Process Checklist

Reasonable Accommodation and Interactive Process Record

Offering an Alternative Position

You may offer an alternative position for which the injured employee is qualified within the work restrictions. Unlike a modification of the regular job, alternative work is a different job within the same company. The alternative position must meet the employee's work restrictions, last at least 12 months, pay at least 85 percent of the wages and benefits of the employee's former position, and be at the same location or within a reasonable commuting distance.

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[118] Lab. Code sec. 4658(d)(1)

[119] Lab. Code sec. 4658.1(b)

[120] *Raine v. City of Burbank*, 135 Cal. App. 4th 1215 (2006)

Return to Work Incentives

Earlier workers' compensation reform legislation created the Return to Work program and employer incentives. However, workers' compensation reform passed in 2012 (SB 863) eliminated this incentive for injuries on or after January 1, 2013.

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Instead, a $120 million return to work fund, funded annually through a surcharge on premiums, has been implemented by the DWC. The program provides a $5,000 payment to workers injured on or after January 1, 2013, who have received a $6,000 Supplemental Job Displacement Voucher.[121]

Incentives Affecting Permanent Disability Payments

For injuries occurring *after January 1, 2005, and prior to January 1, 2013*, the following rules still apply:

- Employers of 50 or more employees may be eligible for a decrease of permanent disability payments.[122] To receive the decrease, you must offer return to work opportunities to injured employees within a specified time frame. You can offer an injured employee regular, modified or alternative work. For the definitions of these terms, see "Returning Permanent and Stationary Employees to Work" on page 689 and "Offering a Modified or Alternate Position" on page 690.
- Eligible employers who fail to offer a return to work opportunity to injured employees within the specified time frame may be subject to a statutory increase of permanent disability payments.[123]

When you make a return to work offer within 60 days of the date the injured employee is considered P&S, subsequent permanent partial disability payments will be reduced by 15 percent, regardless of whether the employee accepts the employment offer. If you do not make a return to work offer within 60 days of the date the injured employee is considered P&S, subsequent permanent partial disability payments will be increased by 15 percent.

If you terminate the employment opportunity prior to the end of the period for which permanent partial disability payments are due, all subsequent payments will be increased to the level they would have been if you had not made the return to work offer.

Special rules apply to return to work offers for injured employees who were employed in seasonal work at the time of their injuries. In this context, "seasonal work" means employment as a daily hire, a project hire or an annual season hire. If the employee was hired for seasonal work prior to the injury, you can make an offer of regular, modified or alternative seasonal work. The return to work offer must provide reasonably similar hours and working conditions to the employee's previous employment. The employment must start within 12 months of the offer date and must last one year, either consecutively or cumulatively. The offer must meet the same conditions as for regular work in all other respects.[124]

Supplemental Job Displacement Benefits

A supplemental job displacement benefit is a nontransferable voucher that an injured employee can use for retraining, skill enhancement or both at state-approved or accredited schools.

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[121] Lab. Code sec. 139.48

[122] Lab. Code sec. 4658(d)(3); 8 CCR sec. 10117(b)(2)

[123] Lab. Code sec. 4658(d)(2); 8 CCR sec. 10117(b)(1)

[124] 8 CCR sec. 9813.2

Injuries Occurring on or After January 1, 2004, and Before January 1, 2013

To be eligible for the following supplemental job displacement benefits, the employee must meet the following criteria:

- The work-related illness or injury must have occurred after January 1, 2004, and before January 1, 2013.
- The injury must have caused permanent partial disability.
- The injured employee does not return to work for the employer within 60 days of the temporary disability termination.[125]

Eligible employees can receive supplemental job displacement benefits in the following amounts:

- Up to $4,000 for permanent partial disability awards of less than 15 percent
- Up to $6,000 for permanent partial disability awards between 15 and 25 percent
- Up to $8,000 for permanent partial disability awards between 26 and 49 percent
- Up to $10,000 for permanent partial disability awards between 50 and 99 percent

The employee can use the voucher for tuition, fees, books and other expenses that the school requires for retraining or skill enhancement. No more than 10 percent of the voucher can be used for vocational or return to work counseling.

If the voucher is issued on or after January 1, 2013, the employee must use it within two years from the time it is issued, or within five years of the injury, whichever is later.[126]

Within 10 days of the last temporary disability payment, you must give the employee notice of supplemental job displacement benefit rights. This notice must be sent by certified mail.

You are not liable for the supplemental job displacement benefit if you meet either of the following conditions:

- Within 30 days of the temporary disability indemnity payments' termination, you offer, and the employee does not accept, modified work that accommodates the employee's work restrictions and lasts at least 12 months.
- Within 30 days of the temporary disability indemnity payments' termination, you offer, and the employee does not accept, alternative work that meets all of the following conditions:
  - The employee is capable of performing the essential functions of the job provided.
  - The job provided is in a regular position lasting at least 12 months.
  - The job provided offers wages and compensation within 15 percent of those paid to the employee at the time of injury.
  - The job is located within reasonable commuting distance of the employee's residence at the time of injury.[127]

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[125] Lab. Code sec. 4658.5

[126] Lab. Code sec. 4658.5(d)

[127] Lab. Code sec. 4658.6

Injuries Occurring on or After January 1, 2013

For injuries dated after January 1, 2013, any permanently partially disabled worker is entitled to a voucher of up to $6,000 unless the employer makes an offer of regular, modified or alternative work that meets the following criteria:

- The offer is made no later than 60 days after the receipt of a report finding that all conditions have become permanent and stationary and that the injury has caused permanent partial disability. (This changes from the previous timeline of within 30 days of termination of temporary disability.) The medical report must be on a specific form created by DWC.
- The offer is for regular, modified or alternative work lasting at least 12 months.[128]
- When the employer offers regular, modified or alternative work to the employee and subsequently learns that the employee cannot lawfully work, the employer is not required to actually provide the regular, modified or alternative work.[129]

No more than $1,000 of the voucher may be used for computer equipment, no more than $500 for cash reimbursement, and no more than 10 percent for vocational counseling. The voucher must be used within two years of issuance.[130] Unlike older vouchers, settlement or commutation of a voucher for injuries after January 1, 2013, is not permitted.

For injuries after January 1, 2013, the supplemental job displacement nontransferable voucher (*Form DWC-AD 10133.32*) is available for download from the DIR's website at www.dir.ca.gov/dwc/forms.html or by calling 1-800-794-6900.

Benefits During Workers' Compensation

As the employer, you are not responsible for paying the employee directly for workers' compensation. You pay your workers' compensation insurance premiums and your workers' compensation provider pays the employee. However, employees often believe they are entitled to more than one type of compensation.

When the employee is first treated by a health care provider for a workers' compensation illness or injury, you must pay for the employee's time. After the initial treatment, the employee is under the health care provider's control. You are not required to pay for treatment-related absences from work. Unless the employee is on FMLA leave, you can require that the employee use paid time off (PTO), such as sick pay, for further physician's appointments or physical therapy, provided that you make the same requirement for employees with non-industrial injuries. The employee can also choose to use PTO for this purpose.

Temporary Disability Benefits

An employee whose workers' compensation claim has been accepted will receive temporary disability benefits from the claims administrator. Temporary disability benefits are payments the employee receives while recovering. Temporary disability payments are calculated at two-thirds of the employee's "average weekly earnings" up to a statutory maximum amount.

When determining workers' compensation temporary disability benefits, the law requires that the benefit be based on the employee's earning capacity, not at the actual wages earned in a particular workweek.

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[128] Lab. Code sec. 4658.7

[129] 8 CCR sec. 10133.34(b)(4)

[130] 8 C.C.R. sec. 10133.31

An employee's earning capacity is reflected by his full-time, regular job before and after the injury. The earning capacity is a better measure of "average weekly earnings" than a low-paying or nominal payment for a temporary, short-term job. The law requires the benefit to be a reasonable representation of the employee's average weekly earning capacity at the time of the injury, not the employee's actual earnings on the day of the injury.[131]

An employee who is on a temporary assignment that pays a significantly lower wage who suffers a work-related injury must be compensated based on the average weekly earning capacity at the time of the injury. All sources of income must be considered to calculate a reasonable and fair amount for the workers' compensation benefits.

State Disability Insurance (SDI) and Workers' Compensation

Employees cannot receive workers' compensation and SDI unless the workers' compensation rate is less than the SDI rate. If the workers' compensation rate is less than the SDI rate, the employee receives the difference between the two rates as SDI. He/she does not receive a combined total of the two benefits.

Paid Family Leave (PFL) and Workers' Compensation

An employee cannot use Paid Family Leave (PFL) for his/her own illness or injury. Therefore, an employee cannot use PFL and workers' compensation concurrently.

Vacation, Sick Pay, PTO and Workers' Compensation

Employees can receive payments for vacation, sick leave or PTO without affecting their eligibility for workers' compensation payments.

You can require your employees to use vacation, sick pay and PTO during any type of disability leave, including workers' compensation. If you do, create a written policy that requires your employees to use paid leave before taking unpaid or partially unpaid leave.

New 2016 California employers were to begin providing mandatory paid sick leave benefits on July 1, 2015 (AB 1522, the Healthy Workplaces, Healthy Families Act of 2014).

At the time of publication, the Labor Commissioner has not provided guidance as to how mandatory paid sick days will be treated in relation to workers' compensation leave. These mandatory paid sick days may be treated the same as optional, employer-provided sick days were treated in the past. In other words, you could have a policy requiring an employee to use the mandatory paid sick leave days before having unpaid or partially unpaid leave. Please continue to look for guidance from the state Labor Commissioner at www.dir.ca.gov.

If the employee is eligible for FMLA, you cannot require him/her to use vacation, sick pay or PTO during a FMLA leave that runs concurrently with the workers' compensation disability. However, the employee can use accrued benefits to supplement workers' compensation if you both agree to do so. If you are not covered by FMLA or the employee is not eligible for FMLA, you can require that the employee use any paid time off during any absences due to a work-related injury.

Permanent Disability Indemnity

After an employee has reached a permanent and stationary status, he or she may be entitled to permanent disability indemnity payments to compensate for the residual impairments. The length of time that permanent disability indemnity payments are made is dependent upon the extent of the impairment.

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[131] *County of San Joaquin v. WCAB*, 147 Cal. App. 4th 1459 (2007)

For injuries between January 1, 2005, and January 1, 2013, these weekly payments range from $187 to as much as $264.50, depending on the extent of the impairment and whether the employee was provided with a Return to Work Offer.

Employees injured on or after January 1, 2013, may receive weekly permanent disability up to $290, depending on the extent of impairment. The Return to Work incentives have been discontinued.

Continuing Benefits During Workers' Compensation

The WCAB decided how long an employer must maintain health benefits for an employee on workers' compensation leave. The WCAB ruled that employees on workers' compensation leave are entitled only to the same continuation of group health benefits as employees on other types of disability leaves.

In *Navarro v. A&A Farming*, disabled employees' health coverage continued for 90 days for both work and non-work-related absences. An employee with an industrial injury was told that his health benefits would end after 90 days unless he chose to extend those benefits under COBRA. The employee alleged discrimination under Labor Code section 132(a), arguing that he would have had continued coverage if not for his industrial injury.

The WCAB concluded that ERISA preempts state regulation of employee benefit plans, so the state cannot require an employer to provide health benefits to an employee it would not otherwise cover.[132]

If you have 50 or more employees and the employee is eligible for FMLA/CFRA, your employee maintains his/her health benefits for up to 12 weeks at the same level as if he/she were still at work. If you have fewer than 50 employees or the leave has expired, you can terminate the employee's health benefits and send a Consolidated Omnibus Budget Reconciliation Act (COBRA) notice if:

- Your health plan is Employee Retirement Income Security Act (ERISA) qualified.
- You exceeded the benefits that your contractual agreement with your carrier provides.

If your plan is not ERISA qualified, you are not required by law to continue health insurance benefits. However, cases from the WCAB indicate that you must continue benefits as if the employee were still on the payroll.[133] If you plan to terminate non-ERISA qualified health benefits for an employee on workers' compensation, consult legal counsel first.

1. If your employee health plan is ERISA qualified, in your employee handbook, advise employees of the length of time that coverage remains in effect for any type of illness or injury.

2. Send a timely notice to the employee about his/her Cal-COBRA/COBRA rights after the continuation of health benefits expires.

In *State Department of Rehabilitation v. WCAB*, an employer required an injured employee who returned to work with a permanent injury to use sick leave or vacation time when he was absent for continuing medical treatment. The employee claimed that the company's requirement constituted discrimination in violation of Labor Code section 132(a). The court ruled that he had no legal right to continued temporary disability benefits and his absences could be treated the same as absences for medical appointments for nonindustrial injuries.[134]

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[132] *Navarro v. A&A Farming*, 67 Cal. Comp. Cases 145 (2002) (en banc)

[133] *Navarro v. A&A Farming*, 67 Cal. Comp. Cases 1364 (2002) (writ denied)

[134] *State Department of Rehabilitation v. WCAB* (Lauher), 30 Cal. 4th 1281 (2003)

Family and Medical Leave

Federal and state laws require covered employers to provide time off to an employee for personal illness. Time off from work to recuperate from an industrial injury most likely qualifies employees for protection under the FMLA and the CFRA. Although some differences exist between the two laws, the leave provided by both laws runs concurrently for workers' compensation purposes.

Employees are entitled to continued health benefits during FMLA leave if you provide those benefits under a group health plan. For more information on federal and state medical leave laws, see Chapter 18, "Family and Medical Leave."

If you fail to provide or delay providing notice of FMLA/CFRA coverage to the injured employee, the employee receives additional time off with job protection benefits above and beyond the period of workers' compensation disability leave. Also, you may unwittingly violate the FMLA or the CFRA if you do not reinstate an employee following leave for a workers' compensation injury that was not properly designated as FMLA.

Penalties

Failure to maintain workers' compensation coverage can result in:

- A stop order prohibiting you from using employee labor, to take effect immediately upon being served with the order
- Liability for up to 10 days' wages for an employee's time lost due to the stop order
- Liability for employee benefits, as if you had been covered
- A penalty of $1,500 per employee employed at the time the stop order is issued and served, as an additional penalty for being uninsured[135]
- Other penalties

An injured employee of an uninsured employer is provided access to an expedited hearing calendar for his or her workers' compensation claims.[136]

An injured employee can also sue you in civil court for damages. You are presumed negligent. You cannot turn to common law defenses, such as contributory negligence or assumption of risk. The employee often attaches your property to a lawsuit to satisfy any damages awarded and attorneys' fees.

The DIR, upon receiving and investigating a claim, can prohibit you from operating until you secure coverage; prosecute you if you fail to comply with a stop order; and fine you up to $10,000 per employee.[137]

Even a brief lapse in coverage that is subsequently corrected can result in significant penalties. In *Leo's Associates, Inc. v. Department of Industrial Relations*, an employer was warned that its workers' compensation insurance would be canceled on a given date due to failure to file payroll reports and premiums. The payroll reports and premiums were brought up-to-date six weeks later. The insurer furnished a letter stating that it withdrew the cancellation and confirmed coverage without lapse. However, before the letter was received, a deputy labor commissioner conducting a workplace inspection asked to see proof of workers' compensation coverage. When company officials could not provide proof of coverage, a stop order was issued and an $18,000 penalty levied against the employer.

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[135] Lab. Code sec. 3722 (a)

[136] Lab. Code sec. 5502(c), effective January 1, 2015

[137] Lab. Code secs. 3707, 3708, 3710.1, 3710.2, 3722(d)(2)

The company appealed the penalty, arguing that the insurer reinstated coverage retroactively. The court upheld the penalty because at the time of inspection, the coverage was not in effect.[138]

Penalties for Workers' Compensation Fraud

California's Insurance Code includes increased criminal penalties for fraudulent acts committed in connection with workers' compensation. The following conduct violates the Insurance Code:[139]

- False or fraudulent statement or material representation for the purpose of obtaining or denying any compensation
- False or fraudulent written or oral material statements supporting or opposing any claim for compensation
- Assisting, abetting, conspiring with or soliciting any person in an unlawful act
- False or fraudulent statements about the entitlement to benefits to discourage an injured employee from claiming benefits or pursuing a claim
- False or fraudulent material statements or material representation for the purpose of obtaining or denying any of the benefits or reimbursement provided in the Return to Work Program
- False or fraudulent material statement or material representation for the purpose of discouraging an employer from claiming any of the benefits or reimbursement provided in the Return to Work Program

These violations can be punished by:

- Imprisonment in county jail for one year
- Imprisonment in state prison for two, three or five years
- A fine not exceeding $150,000 or double the value of the fraud, whichever is greater
- Both imprisonment and fine

The court may order restitution, including restitution for any medical evaluation or treatment services obtained or provided.

A person with a prior felony conviction receives a two-year enhancement for each prior conviction. These penalties may be in addition to those under any other provision of criminal law that applies or may apply to any transaction.

Employee Protection From Discrimination

Labor Code section 132a prohibits an employer from discharging, threatening or discriminating in any way against an employee because he/she received an award from, filed or intends to file a workers' compensation claim. Do not take any adverse action against an employee who received an award from, filed or intends to file a workers' compensation claim without considering the possibility of a discrimination or retaliation claim.

If you are found to be in violation of Labor Code section 132a, you may be subject to financial penalties up to $10,000. You may also be required to reinstate the employee and reimburse him/her for lost benefits and wages.

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[138] *Leo's Associates, Inc. v. Department of Industrial Relations*, 120 Cal. App. 4th 628 (2004)

[139] Insurance Code sec. 1871.4

In *Judson Steel Corp. v. WCAB*, the California Supreme Court ruled that denying seniority rights to an employee who missed time from work due to his workers' compensation claim violated Labor Code section 132a, despite the company's showing that the employee was treated no differently from other employees with nonindustrial injuries.

Employers bear the burden to produce evidence to show that the decision not to reinstate the employee was based on a legitimate "business necessity." The California Supreme Court stated that the Labor Code's provision "does not compel an employer to ignore the realities of doing business by re-employing unqualified employees or employees for whom positions are no longer available."[140]

In *Smith v. WCAB*, the court ruled that employers cannot engage in conduct detrimental to the employee unless that conduct "is necessitated by the realities of doing business."[141]

Disability Discrimination Laws and Workers' Compensation

An employee who is a qualified person with a disability under the ADA or FEHA has rights to reinstatement to an existing, modified or alternative job if he/she can perform the job's essential functions with or without reasonable accommodation. You can deny reinstating a qualified disabled employee only if it would cause undue hardship or constitute a direct threat to the health and safety of the employee or his/her co-workers.

The relationship between workers' compensation and disability discrimination laws requires that you consider permanent modified duty or alternative assignments for employees who are not expected to recover from their injuries sufficiently to permit them to return to their original jobs. Modified duty and alternate assignments can help you comply with your obligations under the ADA and FEHA.

You cannot refuse to allow an individual with a disability to return to work even if he/she is not fully recovered from the work-related injury, with two exceptions. You can refuse if you can show that:

- The individual cannot perform the job's essential functions with or without reasonable accommodation.
- The individual would pose a direct threat to himself/herself or others if returned to work under reasonable accommodations.

Neither the ADA nor FEHA requires you to create light-duty positions unless the heavy duty tasks consist of marginal job functions that could be reallocated to co-workers as part of a reasonable accommodation process. However, if you have created light-duty positions in the past, you may be obligated to offer an accommodation to the injured employee who has a disability.

Employees Can Sue for Discrimination

The Labor Code states that workers' compensation is an employee's exclusive remedy for an injury and does not allow an employee to file a civil lawsuit. However, employees can sue for other types of discrimination.

In *City of Moorpark v. The Superior Court of Ventura County*, the California Supreme Court ruled that employees who suffer discrimination based on a work-related disability can sue for disability discrimination, a violation of FEHA, and for common-law wrongful termination. Before this decision, employees who suffered discrimination based on a work-related injury could seek remedies only under the workers' compensation system.[142]

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[140] *Judson Steel Corp. v. WCAB*, 22 Cal. 3d 658 (1978)

[141] *Smith v. WCAB*, 152 Cal. App3d 1104, 1109 (1984)

[142] *City of Moorpark v. The Superior Court of Ventura County*, 18 Cal. 4th 1143 (1998)

Similarly, in *Bagatti v. Department of Rehabilitation*, a California Court of Appeal allowed a disabled employee to sue her employer under FEHA. The employee suffered an on-the-job injury after her employer refused to accommodate her disability. The employer argued that the employee could not file a lawsuit for physical injury because the employee was protected by workers' compensation law. The court disagreed. It ruled that because her physical injury claim could be related to the employer's failure to accommodate her disability, which is an unfair employment practice under FEHA, she should have a trial to prove if her injury resulted from that failure.[143] For more information, see "Failure to Accommodate" in Chapter 28, page 855.

Cases such as these allow disabled employees to pursue significant additional financial remedies if they can show that their employers violated FEHA. Labor Code section 132a offers only a limited remedy. Violating the state's anti-discrimination laws makes compensatory and punitive damages available.

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[143] *Bagatti v. Department of Rehabilitation*, 97 Cal.App.4th 344 (2002)

Chapter 26

Employment Discrimination

The word “discrimination” is often overused and stretched beyond its legal meaning. “Discrimination” is often used as a synonym for anything an employee may personally believe is unfair. In employment law, however, the word “discrimination” is more narrowly defined and limited in context.

This section thoroughly explores employment discrimination as defined by both federal and state anti-discrimination laws, including:

- Title VII of the Civil Rights Act of 1964 (Title VII)
- The California Fair Employment and Housing Act (FEHA)
- The Age Discrimination in Employment Act (ADEA)
- Other state and federal protections

This section is designed to help you recognize and avoid unlawful discrimination in your workplace. Also, you’ll read about how these laws are enforced and who is held liable for acts of discrimination. In addition to commonly recognized employment discrimination laws, this section discusses other, less widely known state and federal protections against discrimination and retaliation.

Chapter 27, “Harassment,” discusses sexual harassment and workplace harassment in general. Chapter 28, “Disabilities in the Workplace,” discusses disability discrimination under the Americans with Disabilities Act (ADA).

Discrimination Defined

Legally, the term “discrimination” covers only actions that are taken against people because they belong to certain protected classes. To discriminate means to treat those people in some way differently than other people who are not in the same class. For more information on protected classes in California, see “Protected Classes” on page 701.

Discrimination happens in many ways, some of which may not be intentional. For example, a supervisor does not usually decide to overlook a person for promotion because of race or gender. Certain acts can constitute unlawful discrimination because of their effect, regardless of the motivation for these acts.

Protected Classes

In California, discrimination based on the following protected bases is prohibited:

- Age, for people 40 and older
- Genetic information
- Marital status
- Medical condition (including cancer/genetic characteristics) or AIDS/HIV status
- Mental or physical disability
- National origin and ancestry, including:

    - Language use
    - Holding a driver's license granted under Vehicle Code section 12081.9 (for undocumented persons)
- Pregnancy and perceived pregnancy
- Race and color
- Religion
- Sex, including:
    - Pregnancy, childbirth, breastfeeding and related medical conditions
    - Gender identity or gender expression
- Sexual orientation
- Military and veteran status

Applicants, employees and unpaid interns are generally protected from discrimination based on protected class under state law.

FEHA Covers Perceptions and Associations

FEHA protects not only actual membership in the classes that FEHA specifies, but also perceived membership in one or more of those classes. For example, an individual could file a sexual orientation discrimination charge, claiming that he was discriminated against because he was perceived as homosexual even if he is not, in fact, homosexual.

In addition, FEHA protects a person if he/she associates with a person who has, or is perceived to have, any of the characteristics that FEHA protects.[1]

Unequal (Disparate) Treatment

Disparate treatment discrimination can occur when an employee who belongs to a protected class is treated differently, specifically because of his/her protected class status.[2]

In rare circumstances, the employee has direct evidence of unequal treatment, such as a manager who admits he terminated an employee because of race. However, in most cases, the employee does not have direct evidence and must prove his/her case by inference.

In a failure-to-hire case, the applicant bears the initial burden of establishing the following four criteria:

- Membership in a protected class
- That he/she applied for a job vacancy for which the employer sought applicants
- That he/she was qualified for the job and was denied it
- That the employer continued to accept applications for the job[3]

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[1] Govt. Code sec. 12926(m)

[2] *Golden v. International Assn. of Firefighters Local 55*, 633 F.2d 817 (9th Cir. 1980)

[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)

Similar criteria can be applied to employment decisions other than hiring, such as promotions or terminations.[4] To establish discrimination in cases related to employment decisions, the employee must initially establish the following four criteria:

- Membership in a protected class
- That he/she was performing competently in the position held
- That he/she was subjected to an adverse employment action
- Some circumstance suggesting a discriminatory motive[5]

If an employee shows that he/she was forced to leave employment because of intolerable or discriminatory working conditions, disparate treatment may have occurred.[6] For more information, see "Constructive Discharge" in Chapter 27, page 799.

You can dispute a disparate treatment claim by showing that either:

- You did not treat the employee differently.
- The reasons for the different treatment were legal and nondiscriminatory.

If you are able to demonstrate a legitimate, nondiscriminatory reason for your action, the employee must then prove that your action was motivated by a discriminatory reason or that your stated explanation is untrue.[7]

Adverse Employment Action

One of the elements an employee must prove in either a disparate treatment discrimination case or a retaliation case is that the employee experienced an "adverse employment action."

Neither federal nor state anti-discrimination laws specifically define "adverse employment action." The Ninth Circuit Court of Appeals and the California Supreme Court each expressed different views on what constitutes an adverse employment action.

The Ninth Circuit Court of Appeals, relying on the definition that is contained in the Equal Employment Opportunity Commission (EEOC) *Compliance Manual*, uses a "deterrence test." Under the deterrence test, an adverse employment action is an action that is reasonably likely to deter employees from engaging in a protected activity.[8] This type of adverse employment action can include a lateral transfer,[9] poor performance ratings,[10] exclusion from activities that would lead to salary increases, denial of secretarial support, a more burdensome work schedule[11] or an unfavorable job reference.[12]

The California Supreme Court takes a more restrictive view in interpreting FEHA. The California Supreme Court agrees with the federal courts that an adverse employment action is not limited to "ultimate" employment acts, such as hiring, firing, demoting or failing to promote an employee. But, the employer's action must result in a substantial adverse change in the terms and conditions of the plaintiff's employment. A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient. This higher standard prevents "judicial micromanagement of business practices" and "frivolous suits over insignificant slights."[13]

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[4] *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277 (7th Cir. 1977)

[5] *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317 (2000)

[6] *Satterwhite v. Smith*, 744 F.2d 1380 (9th Cir. 1984)

[7] *Reeves v. Safeway Stores*, 121 Cal. App. 4th 95 (2004)

[8] *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000)

[9] *St. John v. Employment Development Department*, 642 F.2d 273 (9th Cir. 1981)

[10] *Yartzoff v. Thomas*, 809 F.2d 1371 (9th Cir. 1987)

[11] *Strother v. Southern California Permanente Medical Group*, 79 F.3d 859 (9th Cir. 1996)

[12] *Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997)

An action is minor if, from an outside perspective, the action is not likely to do more than anger or upset an employee. Minor actions do not materially affect the terms, conditions or privileges of employment and do not qualify as discrimination. But an employee can claim discrimination for adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion.[14]

Mixed Motive Cases

Some discrimination cases involve "mixed motives." The employee has evidence of unlawful discrimination, but the employer can show that it still would have made the decision to terminate the employee for legitimate, nondiscriminatory reasons, such as poor performance.

In *Harris v. City of Santa Monica*, the California Supreme Court ruled that an employee in a discrimination lawsuit bears the burden of showing that discrimination is a "substantial motivating factor" in the adverse action taken against the employee. If the employee cannot show this, the case is over and the employer prevails.

If the employee can show discrimination was a substantial factor motivating termination, but the employer can show it would have made the same decision anyway for legitimate, lawful reasons, liability is significantly lessened. The court ruled that if an employer can prove that it would have made the same decision anyway, based on its lawful, nondiscriminatory reason standing alone, the employee is not entitled to damages, back pay or reinstatement. This includes emotional distress damages. Other non-monetary relief and attorneys' fees may still be available to the employee.[15]

The court noted that the FEHA prohibits discrimination that causes an employer to refuse to hire someone, to terminate someone or to otherwise discriminate against a person in the terms and conditions of employment.

"Requiring the plaintiff to show that discrimination was a substantial motivating factor, rather than simply a motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision," the court's ruling stated.

For more information, please see "Remedies Under FEHA" on page 764.

Discriminatory Intent

The U.S. Supreme Court potentially expanded employer liability for discrimination and harassment claims when it ruled in 2011 that an employer can be liable for wrongful termination even if the manager who ultimately makes the termination decision acted with no discriminatory intent.

In *Staub v. Proctor Hospital*, Staub was a military reservist. He claimed that two of his immediate supervisors demonstrated bias against him because of his military status and military obligations. These two supervisors allegedly passed on false information to the vice president of HR in an attempt to have Staub fired.

The VP relied on that information in deciding to terminate Staub. The employer claimed that there was no evidence that the ultimate decision maker, the VP, had any hostility toward Staub based on his military status. Staub argued that the VP's decision to terminate him was based on the reports by his supervisors that reflected their bias against him. The Court sided with Staub.[16]

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13. *Akers v. County of San Diego*, 95 Cal. App. 4th 1441 (2002)
14. *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028 (2005)
15. *Harris v. City of Santa Monica*, 56 Cal.4th 203 (2013)
16. *Staub v. Proctor Hospital*, 131 S.Ct.1186 (2011)

Though this case involved military leave, the analysis will apply to discrimination claims. Simply having a centralized person, such as the HR director, doing the hiring and firing will not insulate an employer from liability from supervisors who engage in discriminatory conduct.

Unequal (Disparate) Impact

An employment practice that appears to be neutral but, in practice, discriminates against protected classes creates a disparate impact, which violates anti-discrimination laws.[17] A common example is a weight and height requirement that adversely impacts women but is not actually required for the job.

In disparate impact cases, an employer's motivation to establish the particular employment practice is irrelevant. If an employee can show that an apparently neutral policy creates a harsher impact on a protected class, that policy is illegal unless the employer can show that the practice is job-related and consistent with business necessity.[18] However, a plaintiff can prevail by demonstrating that another business practice exists that would produce a less discriminatory effect and that the employer refused to adopt that practice.[19]

Discrimination Law Posting Requirements

You are required to post federal and state anti-discrimination posters. You must post them in a conspicuous place that is available to employees and applicants. You must post the following:

- State discrimination poster: "Discrimination and Harassment in Employment are Prohibited by Law"
- Federal discrimination poster: "Equal Employment Opportunity is THE LAW"

Both of these postings are part of CalChamber's ***2016 California and Federal Employment Notices Poster*** which can be found at store.calchamber.com.

Retaliation

Both federal and state law protect employees and applicants from employer retaliation for engaging in activity that is protected by anti-discrimination laws.

You cannot retaliate against employees for participating in activities to further the enforcement of employment discrimination laws.[20] The retaliation prohibition is quite broad and includes retaliation against a person who objected to a practice that is legal but that the person reasonably believed to be illegal. Protection from retaliation is not limited to applicants and employees; it covers all individuals, including former employees.[21]

There are also retaliation protections for whistleblowers.

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[17] *Griggs v. Duke Power Company*, 401 U.S. 424 (1971)

[18] 1991 Civil Rights Act sec. 105

[19] 1991 Civil Rights Act sec. 105

[20] Govt. Code sec. 12940(h)

[21] *Sherman v. Burke Contracting Co.*, 891 F.2d 1527 (11th Cir. 1990)

California Law Defines Retaliation Protections

California law defines "retaliation" as any adverse employment action against an individual who opposed FEHA-prohibited practices or who filed a complaint, testified, assisted or participated in an investigation or proceeding conducted by the Department of Fair Employment and Housing (DFEH).

These protected activities include:

- Seeking advice from the DFEH, whether a complaint is filed or ultimately sustained
- Assisting or advising any person seeking advice from the DFEH, whether a complaint is filed or ultimately sustained
- Opposing employment practices that an individual reasonably believes to exist and believes to violate FEHA
- Participating in an activity that the employer perceives as opposition to discrimination, whether intended by the individual expressing the opposition
- Contacting, communicating with or participating in a DFEH proceeding due to a good-faith belief that FEHA was violated
- Contacting, communicating with or participating in local human rights or civil rights agency proceedings about employment discrimination on a protected basis
- Involvement as a potential witness, which an employer or another covered entity perceives as participating in a DFEH activity

However, an employer is protected when it enforces reasonable disciplinary policies and practices or prevents acts that are either disruptive or otherwise detrimental to legitimate business interests.[22]

Federal Laws Define Retaliation Protections

Federal laws contain prohibitions on retaliation. Title VII, the ADEA, the ADA and the Equal Pay Act (EPA) prohibit retaliation by an employer, employment agency or labor organization because an individual engaged in a protected activity.

This protected activity consists of:

- Opposing a practice that is unlawful under one of the employment discrimination statutes
- Filing a charge or testifying, assisting or participating in any manner in an investigation, proceeding or hearing under an anti-discrimination statute

People who claim retaliation under Title VII, the ADA, the ADEA or the EPA need not claim discrimination based on race, religion, sex, national origin, age or disability, nor must they be a qualified individual with a disability or in the age group protected by the ADEA. Retaliation is unlawful even if it occurs after the employment relationship ends. An applicant, employee or former employee can bring an ADA retaliation claim against an individual supervisor and an employer.

U.S. Supreme Court Defines Retaliation Protections

In *Burlington Northern & Santa Fe Railway Co. v. White*, the U.S. Supreme Court ruled that any employer action that would cause a reasonable employee to refrain from making or supporting a discrimination charge may support a retaliation claim under Title VII. As such, the anti-retaliation provision of Title VII provides broader protection than the anti-discrimination provisions. The anti-discrimination provisions require an applicant or employee to prove that he/she suffered an adverse employer action that affects employment or alters the conditions of the workplace as a result of engaging in an activity that is protected by anti-discrimination laws.

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[22] Govt. Code sec. 12940; 2 CCR sec. 11021

The Supreme Court's ruling makes it clear that juries are not required to find that retaliatory actions relate only to the terms or conditions of employment. According to the U.S. Supreme Court, common sense suggests that an employee would be discouraged from bringing discrimination charges if the employer required that he/she spend more time performing more arduous duties and ordered the employee on an indefinite suspension without pay, even though the suspension was rescinded and lost pay restored. A reasonable employee who faces the choice between retaining his/her job and paycheck and filing a discrimination complaint might well choose the former. The anti-retaliation provision in Title VII is meant to protect employees from being in that position.[23]

Employees Protected From Retaliation

In another U.S. Supreme Court case, the Court found that Title VII covers third-party claims of retaliation brought by persons who did not themselves engage in any protected activity.[24] The case arose after an employee was fired shortly after his fiancée filed a sex discrimination claim against the company where they both worked.

The Court unanimously held that if the alleged facts were true, then firing the male employee was unlawful retaliation even though his fiancée complained of unlawful conduct.

Whistleblower Protections

Various federal and state laws also protect individuals who "blow the whistle" and report company violations of the law, such as violations of workplace safety, financial reform and securities laws.

California Provides Broad Protections

In California, Labor Code section 1102.5 encourages employees to notify an appropriate government or law enforcement agency when they have reason to believe that their employer is violating laws that were enacted to protect corporate shareholders, investors, employees and the general public. These are commonly referred to as "whistleblower" protections. Even without this legislation to protect employees, terminating an employee who reported such violations would likely be a wrongful termination in violation of public policy.

Labor Code section 1102.5 provides expansive whistleblower protections to California employees.

It is illegal in California to make, adopt or enforce any rule, regulation or policy to:

- Prevent an employee from:
  - Disclosing information to a government or law enforcement agency
  - Disclosing information to a person with authority over the employee (internal complaints)
  - Disclosing information to another employee who has the authority to investigate, discover, or correct the violation (internal complaints)
  - Providing information to, or testifying before, any public body conducting an investigation, hearing or inquiry

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[23] *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006)

[24] *Thompson v. North American Stainless LP*, 131 S.Ct. 863 (2011)

- If the employee reasonably believes that the information discloses either of the following:
  - A violation of state or federal statute
  - A violation of or noncompliance with a local, state or federal rule or regulation

Labor Code section 1102.5 prohibits retaliation against an employee for disclosing this type of information or because the employer *believes the employee may disclose this type of information* — even if the employee has not actually done so. For more information, see "California — Perceived Whistleblowers" on page 708.

An employee is protected from retaliation when the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a local, state or federal rule or regulation. In other words, there does not need to be an actual violation of the law; the employee is protected if the employee had reasonable cause to believe that the information disclosed a violation of the law. Employers cannot discipline, terminate or otherwise take adverse action against an employee who engages in protected whistleblower activity.

An employee who refuses to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state or federal rule or regulation is also protected from retaliation. These protections apply even if the activity involved a former employer.[25]

The protection further extends to employees of:[26]

- The state or any political subdivision of the state
- Any county, city or city and county, including any charter city or county
- Any school district or community college district
- Any municipal or public corporation
- Any political subdivision
- The University of California

A report that an employee of a government agency makes to his/ her employer is a disclosure of information to a government or law enforcement agency. [27]

New 2016

Legislation effective January 1, 2016, expands the whistleblower protections of Labor Code section 1102.5. The new law prohibits employers from retaliating against an employee because a family member of the employee has engaged in any of the protected whistleblowing activity, or is perceived to have engaged in protected whistleblowing activity, under Labor Code section 1102.5.[28] For example, if Bob's spouse, Jane, goes to Cal/OSHA to complain about Bob's workplace conditions, Bob's employer cannot retaliate against him because of Jane's activities.

California — Perceived Whistleblowers

Labor Code section 1102.5 also prohibits retaliation against employees because the employer believes the employee blew the whistle — even if the employee has not actually done so.

In addition to protections under the Labor Code, perceived whistleblowers are also protected by state public policy.[29]

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[25] Lab. Code sec. 1102.5(a–c)

[26] Lab. Code sec. 1106

[27] Lab. Code sec. 1102.5(e)

[28] Lab. Code sec. 1102.5(h)

[29] *Diego v. Pilgrim United Church of Christ*, 213 Cal.App.4th 913 (2014)

One appellate court found that the public policy behind California's whistleblower statute should protect employees who are mistakenly suspected of whistleblowing. The court noted that the purpose behind Labor Code section 1102.5 is to "encourage employees to notify an appropriate government or law enforcement agency when they have reason to believe their employer is violating laws."

The court reasoned that protections should extend to employees suspected of whistleblowing so employees are not discouraged from bringing complaints. If you could lawfully fire an employee simply because you suspected he/she was going to file a complaint, it would certainly discourage employees from actually filing complaints.

California — Enforcement of Whistleblower Protections

A corporation or limited liability company is liable for a civil penalty not exceeding $10,000 for each violation, in addition to any other liabilities it may incur.[30]

Effective January 1, 2016, not only is the employer liable for a violation of the whistleblower protection law, but also:[31]

- A "client employer" — a specific definition related to companies who contract for labor, such as companies that use staffing agencies.[32] See"Contingent Workers" in Chapter 6, page 87.
- Any employer on a multiemployer worksite that exposed workers to hazardous conditions, created the hazard, was responsible for the health and safety of the worksite and/or was responsible for correcting the hazard.[33]

The law specifically exempts rules, regulations or policies that implement the confidentiality of the lawyer-client privilege, the physician-patient privilege, or trade secret information. Also exempt are actions by employers against employees who violate these rules.[34]

If the employee shows that his/her whistleblowing contributed to the alleged adverse employment action against the employee, burden shifts to the employer to demonstrate, by clear and convincing evidence, that the alleged action would have occurred for legitimate, independent reasons even if the employee did not engage in protected activities.[35]

The Attorney General maintains a confidential whistleblower hotline to receive calls from people with information about possible violations of state or federal statutes, rules or regulations, or violations of fiduciary responsibility by a corporation or limited liability company to its shareholders, investors or employees. Hotline calls are referred to the appropriate government authority for review and possible investigation.

During the initial review of a call, the Attorney General or appropriate government agency must treat information that is disclosed through the whistleblower hotline, including the caller's identity and the employer identified by the caller, as confidential.[36]

California — Required Whistleblower Posting

You must display a list of employees' rights and responsibilities under the whistleblower laws. The poster must include the whistleblower hotline telephone number, and the poster font size must be greater than 14 point type. State agencies can comply with the posting requirement by displaying a notice pursuant to Section 8548.2 of the Government Code or Subdivision (b) of section 6128 of the Penal Code.[37]

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[30] Lab. Code sec. 1102.5 (f)
[31] Lab. Code sec. 1102.5(i)
[32] Lab. Code sec. 28103
[33] Lab. Code sec. 6400
[34] Lab. Code sec. 1102.5(g)
[35] Lab. Code sec. 1102.6
[36] Lab. Code sec. 1102.7 (a-c)

This notice is included in a convenient all-in-one ***California and Federal Employment Notices*** poster, with all 17 required California and federal notices for 2016, available from CalChamber. Order yours at store.calchamber.com.

Other State and Federal Whistleblower Statutes

Additional state and federal whistleblower laws protect employees who report various types of unlawful activity. See "Anti-Retaliation Statutes" in Chapter 29, page 892 for more information.

For example, in California, employees who complain that they are not being paid according to the state's wage-and-hour laws are protected from retaliation.[38] See "Wage and Hour Enforcement and Penalties" in Chapter 10, page 229 for more information.

The federal Fair Labor Standards Act (FLSA) also contains an anti-retaliation provisions which protects employees who complain about violations of federal wage and hour laws. The U.S. Supreme Court has held that a verbal complaint is sufficient to trigger the FLSA's anti-retaliation provisions.[39]

The federal Occupational Safety and Health Administration (OSHA) is charged with enforcing whistleblower protections of more than 22 separate statutes, which can be seen at http://www.whistleblowers.gov/statutes_page.html, including the Sarbanes-Oxley Act and safety statutes.

The Sarbanes-Oxley Act of 2002 protects employees who provide information or assist in investigations into conduct that the employee "reasonably believes" violates federal criminal law relating to:

- Mail or wire fraud
- Bank or securities fraud
- Securities and Exchange Commission (SEC) regulations
- Federal laws protecting shareholders[40]

The Sarbanes-Oxley Act also protects people who testify or otherwise participate in prosecuting these types of violations.

The law protects employees of publicly traded companies and brokerage firms. The law prohibits retaliation or discrimination in employment, discharge and demotion or discipline. It protects employees from harassment or threats of adverse employment action.

The U.S. Supreme Court ruled that Sarbanes-Oxley whistleblower protections should also be extended to cover employees of private companies that contract or subcontract with public companies.[41]

The Securities and Exchange Commission and the federal Occupational Safety and Health Administration (OSHA) enforce the Sarbanes-Oxley Act. For more information, see the OSHA Fact Sheet, *Filing Whistleblower Complaints under the Sarbanes-Oxley Act.*

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[37] Lab. Code sec. 1102.8

[38] Labor Code sec. 98.6

[39] *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325 (2011)

[40] 18 U.S.C. 1514A

[41] *Lawson v. FMR LLC*, 134 S.Ct. 1158 (2014)

Limit to Federal Whistleblower Protection

Generally, federal law provides whistleblower protection to employees who disclose information revealing "any violation of law, rule or regulation," or a "substantial and specific danger to public health or safety."

There is an exception, however, for whistleblower disclosures that are "specifically prohibited by law."

In one case, the U.S. Supreme Court allowed a fired air marshal to proceed with his whistleblower claim, finding that his disclosure was not specifically prohibited by law.[42]

Robert J. MacLean was a federal air marshal for the Transportation Security Administration (TSA). In his role, MacLean was assigned to protect passenger flights from potential hijackings.

In 2003, MacLean contacted a reporter for MSNBC and told him that the TSA was cancelling overnight flights for air marshals in order to save money, even though TSA was in the midst of a hijacking alert. MacLean believed that cancelling those flights during a hijacking alert was dangerous and illegal, given that federal law required the TSA to put an air marshal on every flight that "present[s] high security risks." He brought the story to the press after supervisors told him that nothing could be done.

MSNBC published the story, and the TSA drew criticism for its decision from members of Congress. Within 24 hours, the TSA reversed its decision and put air marshals back on the flights.

A few years after the report, TSA discovered that MacLean was the one who had contacted MSNBC. He was fired for disclosing sensitive security information without authorization. Government lawyers argued that MacLean was not entitled to whistleblower protections because TSA regulations prohibit employees from disclosing sensitive security measures.

The U.S. Supreme Court held that MacLean's disclosures did not violate any federal law, just TSA regulations. The Court noted that the government had legitimate security concerns, but they must be addressed by the president through executive order or by Congress.

Proving Retaliation

To establish a retaliation case, an individual must show that:

- He/she engaged in a protected activity.
- He/she experienced an adverse employment action.
- A causal link existed between the protected activity and the adverse employment action.[43]

After these basic elements are established (a "prima facie case"), the employer's defense is to offer a legitimate reason for the adverse employment action. If the employer produces a legitimate reason for the adverse employment action, a presumption of retaliation no longer exists and the burden shifts to the employee to prove intentional retaliation.[44]

Using these standards, the California Supreme Court ruled that an employee who refuses to carry out an order he/she reasonably believes to be discriminatory is protected from retaliation even if he/she does not advise his/her employer of that belief.

In *Yanowitz v. L'Oreal USA, Inc.*, a supervisory employee was instructed by her supervisor to fire an unattractive female sales employee and replace her with someone "hot." Although she asked the manager to provide a justifiable reason to fire the employee, she never said that firing the saleswoman would be unlawful discrimination. When the supervisor did not comply with her manager's instruction, her previously highly rated performance came under severe scrutiny and criticism. She eventually took a leave of absence for stress and never returned to work.

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[42] *Department of Homeland Sec. v. MacLean*, 135 S. Ct. (2015)

[43] *Iwekaogwu v. City of Los Angeles*, 75 Cal. App. 4th 803 (1999); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)

[44] *Morgan v. Regents of University of California*, 88 Cal. App. 4th 52 (2000); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)

The California Supreme Court ruled that there need not be a specific complaint about unlawful discrimination. Her reasonable belief that her manager's demands were discriminatory combined with the demand for a justifiable reason to fire the employee was sufficient notice to her manager. The heightened scrutiny of the employee's performance accompanied by both public and private criticism materially altered her employment conditions, which created employer liability for the altered work environment.

The California Supreme Court also said that the court could consider all retaliatory acts, including those that occurred too long ago to be independently litigated, if they were part of an ongoing pattern of related conduct.[45]

Proving Retaliation With Circumstantial Evidence

There is no requirement that specific, direct evidence conclusively proves that an employee was fired for filing a sexual harassment complaint against his/her boss. Circumstantial evidence, a series of events or actions taken together, can sufficiently establish employer liability in a claim for retaliatory discharge.

If an employee files a harassment complaint and is demoted or terminated soon afterward, a reasonable person would infer retaliation against the employee for exercising his/her legally protected rights. Courts will look at all of the facts surrounding the employee's termination or demotion, including performance reviews and the company's response to the complaint, to determine if the employer acted unlawfully.[46]

Examples of Retaliatory Conduct

In *Taylor v. City of Los Angeles Dept. of Water and Power*, an employee served as a supporting and material witness in an Equal Employment Opportunity (EEO) complaint against his employer.

The court found that the employer retaliated against Taylor by demoting him and taking away opportunities for advancement. The court also found that the employer and supervisor's behavior would deter other employees from complaining or assisting in enforcement of discrimination and retaliation protections. [47]

In *Patten v. Grant Joint Union High School Dist.*, a California appeals court ruled that a school principal's disclosure to legislative personnel about a school district's use of blank "transfer of funds" forms was whistleblowing. The principal was entitled to a trial to determine if her lateral transfer from one school to another constituted a retaliatory adverse employment action.

Both schools were middle schools and there was no change in the principal's title, wages, benefits and duties. However, the court was persuaded that her material responsibilities were significantly diminished when she was transferred from a challenging assignment at a large underperforming school to a small school with high-achieving students and more parental support. As a relatively young principal with her administrative career ahead of her, the transfer could be viewed unfavorably. The court found that the transfer could be an adverse employment action even though the employee's wages, benefits and duties were the same.[48]

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45. *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028 (2005)

46. *Sylvester v. SOS Children's Villages Illinois, Inc.*, 453 F.3d 900 (7th Cir. 2006)

47. *Taylor v. City of Los Angeles Dept. of Water and Power*, 144 Cal.App.4th 1216 (2006), overturned in part by *Jones v. Lodge at Torrey Pines Partnership*, 42 Cal.4th 1158 (2008)

Preventing Retaliation

An employee who thinks he/she was discriminated against has the right to bring up the matter with a supervisor, other persons in management or a government agency. Any retaliation for making a complaint is strictly illegal, whether the retaliation is obvious (such as discharging the complaining person) or subtle (such as denying a merit increase for being "uncooperative").

Do not view a complaint as a sign of disloyalty. Take complaints seriously and investigate them objectively. Although some discrimination complaints are insincere and harassing, the majority are sincere complaints of perceived mistreatment.

Retaliation at work can sometimes take subtle forms. Make sure you train managers on the scope of whistleblower protections. Measures which may help prevent retaliation in the workplace include:

- Educate employees, especially supervisors, on what constitutes retaliation and the company's policy against it.
- Watch out for the subtle signs of retaliation against an employee, such as ignoring, isolating or undermining the employee, or changing expectations relating to the employee's performance.
- Implement effective complaint procedures that prohibit retaliation.
- Limit the sharing of information regarding employee complaints to those who have a legitimate business need to know the information. Let those employees know that any retaliatory conduct taken against the complaining employee is prohibited.
- Gather, rely on and document objective facts when making hiring and other employment decisions.
- Carefully review discipline and termination decisions that involve individuals who participated in a complaint of unlawful workplace conduct. Consult legal counsel if necessary.

Types of Discrimination

This section discusses the types of discrimination prohibited by federal law, state law or both. The subject matter is organized alphabetically by protected class. Unless otherwise indicated, federal and state law provide the same protection for each protected class. For more information on protected classes, see "Protected Classes" on page 701.

Age

Both federal and state laws prohibit discrimination based on age and protect employees who are age 40 or over. Age can't be used as a basis to not hire an employee or as a basis to discharge or discipline an employee. Age also can't be used as a basis to set compensation or other terms and conditions of employment.

California's Fair Employment and Housing Act (FEHA) contains state protections against age discrimination. The Age Discrimination in Employment Act (ADEA)[49] sets forth federal protections against age discrimination and is enforced by the Equal Employment Opportunity Commission (EEOC). For more information on the ADEA, please see "Age Discrimination in Employment Act of 1967 (ADEA)" on page 743. For more information on defenses specific to the ADEA, please see "'Reasonable Factor Other than Age' as an Age Discrimination Defense" on page 768.

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[48] *Patten v. Grant Joint Union High School Dist.*, 134 Cal. App. 4th 1378 (2005)

[49] 29 U.S.C. 621 et.seq.

Protections Against Age Discrimination

Employers can't:

- Use age as a consideration for employment decisions, such as hiring, firing, discipline or promotions, unless it is a bona fide occupational qualification (BFOQ). For more information, see "Bona Fide Occupational Qualification (BFOQ) as a Discrimination Defense" on page 767.
- Discriminate on the basis of age with regard to the terms, conditions or privileges of employment; for example denying an employee aged 40 or over the educational opportunities made available to younger employees
- Discriminate against someone who opposed, filed a charge against, testified or participated in an investigation of an unlawful employment practice under the ADEA or FEHA
- Place an employment notice or advertisement indicating a preference, limitation or specification based on age, unless age is a BFOQ
- Terminate employees based on salary if the terminations create a disproportionate impact on older workers
- Force an employee to retire because he/she reached a certain age

Job bias is often hidden. Employers will need to establish a legitimate nondiscriminatory reason for any personnel action that is challenged as being the result of age discrimination.

Before a judge or jury can reject the employer's legitimate nondiscriminatory explanation for its decision, the employee must present sufficient evidence that discrimination was the real motivating factor for the decision. The employee can use direct or circumstantial evidence of discrimination.

If an employee can prove that the employer's explanation is false, a jury may decide that the employer is trying to cover up a discriminatory purpose for the negative personnel decision.[50] The employee still retains the ultimate burden to show that age was a reason for the employer's action.[51]

Proof that the employer's explanation is false is one form of circumstantial evidence and in some circumstances it may be enough. In others, the falsity may be too weak to show a discriminatory motive. As the California Supreme Court noted in *Guz v. Bechtel National, Inc.*, the anti-discrimination statutes aren't there to penalize errors or lies, but they are there to prohibit discriminatory motives.[52]

The California Supreme Court made it clear that under California law, an employer may win an age discrimination claim without going to trial if:

- The employer can offer strong evidence of legitimate reasons for the allegedly discriminatory actions.
- The employee offers only weak or circumstantial evidence of a discriminatory motive.

Carefully document the reasons for terminations, demotions and other negative employment actions. Approach each negative action as though convincing a jury that your reasons are legitimate and nondiscriminatory. Accurate performance reviews, warning notices, attendance records and similar documents can help you avoid the appearance of discrimination.

Employees can also bring "disparate impact" age discrimination claims. In a disparate impact case, the claimant need only show that an employer's apparently neutral policy creates a disproportionate adverse effect on a protected class of employees. This contrasts with a "disparate treatment" case, where the claimant must show that he/she was treated differently from others, based on membership in a protected class.

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[50] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000)

[51] *Gross v. FBL Financial Services, Inc.*, 129 U.S. 2343 (2009)

[52] *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317 (2000)

Examples of Age Discrimination

The following cases illustrate the types of age discrimination claims that can land an employer in trouble.

Case No. 1: In *Sandell v. Taylor-Listug, Inc.*, performance evaluations played a crucial role in a court's decision. Robert Sandell worked as vice president of sales for a guitar manufacturer from 2004 to 2007. Six months into his employment, he suffered a stroke and took time away from work to recover. He returned to work, but required a cane to walk and spoke noticeably slower. A few days after Sandell's 60th birthday, the company terminated him, citing displeasure with his performance. Sandell sued for age and disability discrimination.[53]

The employer alleged it terminated Sandell for performance reasons. But the company made several errors that hurt its case. For instance, Sandell received positive performance reviews from management. Sandell's supervisor noted minor deficiencies in his performance, but shifted the blame elsewhere for those deficiencies. The court stated that the positive performance evaluations cast doubt on the company's argument that Sandell was terminated because of poor performance.

It is important that managers write performance evaluations that accurately reflect an employee's performance. If a manager includes language that attempts to soften the blow to an employee, that language can hurt an employer in court.

Case No. 2: In *Reid v. Google, Inc.*, the California Supreme Court ruled that "stray remarks" made by people who are not involved in making a decision related to an individual's employment may be relevant evidence of discriminatory intent. The decision deviates from the position taken by federal courts and makes it easier for California employees to provide evidence of discrimination in court.[54]

The employee alleged that he was a victim of age discrimination. He claimed a high-ranking employee made derogatory remarks about his age, calling his ideas "obsolete" and commenting that he was "slow," "fuzzy," and "lacked energy." The employee also claimed that some of his co-workers referred to him as an "old man," an "old guy," and an "old fuddy-duddy."

In its ruling, the court stated that derogatory "stray remarks" made by non decision-makers or co-workers can properly be considered evidence of discrimination. The court stated that a strict rule excluding this type of evidence in court could exclude relevant, circumstantial evidence of discrimination being presented in a trial, which might lead to unfair results for a plaintiff in court.

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Case No. 3: In *France v. Johnson*, the Ninth Circuit ruled that uninvited questions about retirement coupled with other age-related comments or actions may be evidence of discrimination. A federal border patrol agent was allowed to proceed to trial against the Department of Homeland Security (DHS) on a claim that he was denied a promotion due to his age.[55]

John France is a border patrol agent assigned to Tucson, Arizona. Along with 23 other candidates, France applied for a promotion to four open GS-15 positions that were created because of a new pilot program.

At age 54, France was the oldest of the candidates and was not selected for promotion. The candidates' ages ranged from 38 to 54 years old. The four candidates who were ultimately selected for the GS-15 positions were 44, 45, 47 and 48 years old.

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[53] *Sandell v. Taylor-Listug, Inc.*, 188 Cal.App.4th 297 (2011)

[54] *Reid v. Google, Inc.*, 50 Cal.4th 512 (2010)

[55] *France v. Johnson*, 795 F.3d 1170 (9th Cir. 2015)

France sued DHS, claiming that the promotion decision was based on age. DHS claimed that France lacked the leadership, judgment, flexibility and innovation for the position and argued these were legitimate, nondiscriminatory reasons for not promoting him.

France offered the following evidence to support his claim that the agency's nondiscriminatory reasons were, in fact, just a cover for age discrimination:

- Chief Patrol Agent Gilbert expressed his preference in a staff meeting for "young, dynamic agents" to staff the GS-15 positions.
- Gilbert had repeated retirement discussions with France, despite the fact that France clearly indicated that he did not want to retire. For example:
  - Gilbert asked if France was interested in teaching firearms after he retired, but France said he didn't want to retire.
  - A few months later, Gilbert again asked France what he wanted to do after retirement and France said he wasn't going to retire but planned to apply for the GS-15 position. Gilbert responded that if he were in France's position, he would retire as soon as possible.
- Gilbert was on the panel of interviewers for the GS-15 positions. He also made the recommendation of four of the top six candidates for final consideration. Those four candidates were ultimately chosen.
- France offered testimony from other agents that Chief Border Patrol Agent Aguilar, who also made a recommendation of the final four candidates, preferred younger, less experienced agents.

The Ninth Circuit found that France, had direct and circumstantial evidence that DHS considered his age to be significant in making its promotion decision. The remarks about wanting a "young, dynamic agent" coupled with the retirement discussions were enough to create an inference of age discrimination; at least enough for France to get to trial.

The court noted that the total circumstances will be looked at. Although each event alone might not be enough, the sum total of the discussions created the inference.

The timing of the unwanted retirement discussions was also significant to the Ninth Circuit's decision because they occurred right before the GS-15 positions were posted. "The close proximity in time could allow a reasonable jury to find by a preponderance of the evidence that France's non-selection based on grounds other than age was pretextual," said the court.

Further, even though Gilbert wasn't the ultimate decision maker, the court found that he influenced the decision-making process.

Employer Liable When Bias Influences Decision

The Ninth Circuit Court of Appeals has held that a supervisor who has a bias against older employees exposes his/her employer to liability if the supervisor is able to influence what is supposed to be an objective process.[56]

For more information on constructive discharge, see "Constructive Discharge" in Chapter 27, page 799.

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[56] *Poland v. Chertoff*, 494 F.3d 1174 (9th Cir. 2007)

Substantially Younger Person

Evidence that an age-protected employee was replaced by a "substantially younger" person or that a substantially younger person was given more favorable treatment or promoted can lead to an inference that there was intentional age discrimination.[57]

It's irrelevant that the promoted individuals or individuals who were treated more favorably were also over the age of 40: It just matters if they were "substantially" younger than the complaining employee.

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But what does "substantially younger" mean? This issue was addressed by a federal Ninth Circuit case. The court set a bright line "workable" rule also applied by other circuits.[58]

The court addressed a failure-to-promote case. The average age difference between the employee who was not promoted (54) and the four candidates who were promoted (44, 45, 47 and 48) was eight years.

The adopted rule:

- An average age difference of 10 years or more between the complaining party and his/her replacements will be presumed as substantially younger.
- An average age difference of less than 10 years will be presumed to be insubstantial. However, if the age difference is less than 10 years, a complainant can rebut the presumption by producing additional direct or circumstantial evidence to show that the employer considered the complainant's age to be a significant factor.

In this case, the average eight-year age difference was presumptively insubstantial to raise a claim. However, the Ninth Circuit went on to look at whether the employee had enough evidence to show that the employer considered his age to be significant.

When making employment decisions involving employees age 40 and over, it will be important to consider whether the decision is being made in favor of a substantially younger applicant/employee, especially where the age difference is 10 years or more. As with all employment decisions, ensure that the decision is supported by objective, documented and legitimate business reasons.

Termination Based on Salary

If you terminate employees with higher salaries as a cost-cutting measure, you increase your liability for age discrimination if the cuts disproportionately impact employees age 40 or over. The legal theory is not that you intentionally discriminated against the employee(s), but that your policy unintentionally created a discriminatory impact. For more information, see "Discrimination Defined" on page 701.

A California law targeting age discrimination is a direct result of *Marks v. Loral Corp.*,[59] a California Court of Appeal case. The court held that an employer's decision to terminate certain employees based purely on economic factors was not illegal age discrimination. In response to this decision, the state Legislature passed a law that declared that "the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if that use of criterion adversely impacts older workers as a group ..."[60]

You can use an affirmative defense if your employee claims age discrimination under this law. For more information, see "Defense Against Claims of Discrimination" on page 767.

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[57] *Guz v. Bechtel Nat'l Inc.*, 78 Cal.App.4th 317 (2000); *Begnal v. Canfield & Assocs*, 78 Cal.App.4th 66 (2000)

[58] *France v. Johnson*, 795 F.3d 1170 (9th Cir. 2015)

[59] *Marks v. Loral Corp.*, 57 Cal. App. 4th 30 (1997)

[60] Govt. Code sec. 12941

Reverse Age Discrimination

The U.S. Supreme Court decided that the ADEA does not deter employers from favoring older employees over younger employees. In *General Dynamics Land Systems, Inc. v. Cline*, a collective bargaining agreement included retiree health benefits for employees who retired after 30 years on the job and who were 50 years of age and older on July 1, 1997.

Employees who were over 40 but not yet 50 years old as of that date sued, claiming that the agreement violated the ADEA. The U.S. Supreme Court found that the ADEA's text, structure, purpose, history and relationship to other federal statutes show that the ADEA does not intend to stop an employer from favoring an older employee over a younger one.[61]

Mandatory Retirement and Discrimination

Private-sector employers with 20 or more employees (five or more employees in California) and most public-sector employers cannot institute a mandatory retirement age. The ADEA eliminated the original ceiling of 70 years of age. Separations from employment must happen for reasons other than reaching a certain age.

However, there are exceptions to prohibiting mandatory retirement at any age. For example, states and localities can require mandatory retirement ages for firefighters and law enforcement officers.

The ADEA allows companies to require mandatory retirement at age 65 for employees in an executive capacity for at least two years before retirement and who will receive a retirement benefit of at least $44,000 annually.[62] California requires only a $27,000 annual retirement benefit.[63]

Because of the prohibition against mandatory retirement, you cannot give employees an ultimatum that they either accept retirement under a special early retirement plan or be subject to adverse treatment such as demotion, reduction in pay or diminished chance of career advancement.[64] However, you can lawfully offer purely voluntary early retirement programs to reduce costs.[65]

At least one court found that offering an early retirement option to an employee who is slated for termination due to nondiscriminatory work deficiencies did not violate the ADEA.[66] You cannot refuse to rehire an individual because that individual receives pension benefits.

Employers should be mindful that comments regarding when an employee plans to retire may be considered evidence of age-related bias. For more information, see "Examples of Age Discrimination" on page 715.

Employers will want to provide factual retirement information to employees (for instance relating to company benefits) but not press employees on when they plan to retire or engage in uninvited discussions regarding voluntary retirement plans.

Waivers of Rights by Older Employees

Employees can waive their rights and claims under the ADEA. Employers with 20 or more employees can offer waivers to employees in connection with exit incentives or other employment termination programs.[67]

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[61] *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004

[62] 29 U.S.C. 631(c)(1)

[63] Govt. Code sec. 12942

[64] *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982); *Kne[illegible]y v. Hercules, Inc.*, 577 F. Supp. 726 (D. Del. 1983)

[65] *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339 (D.C. Cir. 1983), cert. denied, 464 U.S. 994 (1983)

[66] *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407 (9th Cir. 1[illegible]

[67] 29 CFR sec. 1625.22

All waivers must:

- Be in writing
- Be "knowing and voluntary"
- Be drafted in plain language geared to the employee's level of understanding
- Specifically refer to the ADEA by name
- Advise employees in writing to seek legal advice before executing the agreement
- Allow at least 21 days within which the employee can consider the agreement. You must give 45 days if the waiver is in conjunction with an exit incentive or termination program that is offered to a group or class of employees
- Allow seven days after the agreement is signed for the employee to change his/her mind and revoke the agreement

Additionally, the waiver cannot waive any future rights that the employee may have after the date the waiver is signed. When drafting a waiver, consult with legal counsel. Waiver requirements are detailed. The courts have held some waivers to be invalid.

Invalid ADEA Waiver

In *Oubre v. Entergy Operations, Inc.*, the U.S. Supreme Court allowed a former employee who received severance pay in exchange for signing a waiver of all claims against her employer to file an age discrimination claim and keep the severance paid to her. The employer attempted to comply with the ADEA's detailed waiver requirements, but did not give the employee the full time period to consider the agreement or to change her mind about it, and failed to make specific written reference to the ADEA.

An employee cannot waive an ADEA claim unless the employer first complies with all the ADEA's requirements.[68] As a result of the Court's decision, an invalid waiver results in the employee retaining the severance money and being able to sue the employer.

AIDS or HIV-Positive Status

California law prohibits employers from requiring HIV testing as a condition of employment and from rejecting, terminating from employment or denying insurance coverage to individuals exposed to the AIDS virus. You cannot use blood tests in any instance to determine insurability or suitability for employment.[69]

Gender and Sex

Both state and federal laws prohibit discrimination in the workplace based on a person's sex.

However, in very limited circumstances, personal privacy considerations may justify a job requirement based on a person's sex. These circumstances include:[70]

- The job requires an employee to observe other individuals in a state of nudity or to conduct body searches.
- It would be offensive to prevailing social standards to have an individual of the opposite sex present.

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[68] *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998)

[69] Health and Safety Code sec. 120980

[70] 2 CCR sec. 11031(b)

- It is detrimental to the mental or physical welfare of individuals being observed or searched to have an individual of the opposite sex present.

California and federal laws prohibit employment discrimination against women on the basis of pregnancy, childbirth and related medical conditions, which is a form of discrimination based on a person's sex. For more information, see "Pregnancy" on page 732.

Employers are clearly prohibited from discriminating against employees or job applicants because of breastfeeding and related medical conditions. The definition of "sex" under the state Fair Employment and Housing Act has been changed to specifically include "breastfeeding and medical conditions related to breastfeeding."[71]

California law includes "gender" within the definition of discrimination based on a person's sex.

You can be held liable for sex discrimination when employees face slurs based on gender stereotypes. In *Nichols v. Azteca Restaurant Enterprises, Inc.*, the Ninth Circuit Court of Appeals ruled that harassment and slurs based on stereotypes of how men and women should act amount to sex discrimination and violate federal employment discrimination laws.[72] Both state and federal laws prohibit sex-stereotyping discrimination.

Gender Identity and Expression

Employers need to be aware of their obligations relating to gender identity protections in the workplace, such as protections for transgender workers.

Under the Fair Employment and Housing Act, "gender" includes both gender identity and "gender expression" and discrimination on either basis is prohibited. Gender expression is defined as "a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."[73]

California law specifically protects an employee's right to appear or dress consistently with his/her gender identity or gender expression. You can require adherence to reasonable workplace appearance, grooming and dress standards. Practically speaking, a male employee who self-identifies as female must be permitted to dress as a female if his clothing and grooming meet reasonable workplace standards.[74]

New 2016

California law prohibits the state from entering into contracts for goods or services of $100,000 or more with a contractor that discriminates between employees on the basis of gender identity, such as being transgender, when providing benefits.

Federal Title VII bars sex and gender discrimination in employment but does not explicitly prohibit workplace discrimination based on gender identity or sexual orientation. However, the federal Equal Employment Opportunity Commission (EEOC) has stated its position that discrimination against an individual because that person is transgender is a violation of Title VII's prohibition of sex discrimination in employment.

The EEOC will accept and investigate charges from individuals who believe they have been discriminated against because of transgender status, gender identity or gender transition. Addressing transgender issues is part of the EEOC's ongoing enforcement efforts in its Strategic Enforcement Plan.

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[71] Govt. Code sec. 12926

[72] *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001)

[73] Govt. Code sec. 12926(r)

[74] Govt. Code sec. 12949

In *Macy v. Holder*, the EEOC ruled that employment discrimination against employees because they are transgender, because of their gender identity and/or because they have transitioned (or intend to transition) is discrimination because of sex and violates Title VII.[75]

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The EEOC has also filed several lawsuits on behalf of transgender workers, marking a significant step in the agency's strategy to interpret Title VII to cover gender identity discrimination:

- The EEOC sued a check printing company, contending that the company discriminated against a transgender employee by refusing her access to the women's restroom and subjecting her to a hostile work environment. The case is pending (*EEOC v. Deluxe Financial Services Corp.*).
- The EEOC asserted that a transgender funeral director lost her job for failing to conform to sex stereotypes. A federal court refused to dismiss the EEOC's complaint, finding that the EEOC sufficiently raised a claim that the funeral home engaged in illegal stereotyping. The case is pending (*EEOC v. R.G. & G.R. Harris Funeral Home*).
- The EEOC alleged that an eye clinic engaged in illegal gender stereotyping under Title VII when it fired a director after she began transitioning from male to female. In a historic settlement, the clinic agreed to pay $150,000, adopt a transgender discrimination policy and provide managers with training on gender issues (*EEOC v. Lakeland Eye Clinic, P.A.*).

Preventing Gender Identity and Gender Expression Discrimination

Employers may want to keep these issues in mind:

- Allow employees to dress and present themselves according to their gender identity.
- Use the name and gender pronoun that corresponds with an employee's gender identity, both in employee records and in communications with and about the employee. In the EEOC's *Lusardi v. McHugh* ruling, the agency made clear that refusing to use the correct pronouns could contribute to an unlawful hostile work environment based on sex.[76]
- To prevent misconceptions and stereotypes from escalating into discrimination or harassment, incorporate sensitivity to gender identity and gender expression issues into EEO and anti-harassment training programs. Also consider providing training, as needed, when a transgender employee announces that he/she is transitioning to support the employee, manage the workplace transition process and encourage sensitivity from co-workers.
- Respect privacy and confidentiality. Make sure you have an employee's permission before disclosing to anyone that the employee is transgender. Avoid asking excessively personal questions that would be considered inappropriate if asked of non-transgender workers. And, be scrupulous about protecting the confidentiality of any medical information the employee may provide to you to enable you to better accommodate his/her needs.

Examine your equal employment opportunity policies to ensure that gender identity and gender expression are included as protected categories, as required by California law.

Restroom Issues

Employers may have questions on a common workplace issue involving transgender workers — which restroom to use. The basic guideline is that employees should be permitted to use the restroom that corresponds with their gender identity.

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[75] *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (2012)

[76] *Lusardi v. Dept of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (April 1, 2015)

Co-worker concerns around sharing facilities can typically be managed through education. Employers should keep in mind that co-worker or supervisor discomfort can never justify discriminatory terms and conditions of employment.

Recent rulings provide useful guidance to employers:

- The California Department of Fair Employment and Housing sued on behalf of a transgender employee whose employer allegedly required him to use the women's restroom and locker room pending completion of female to male sex reassignment surgery. The superior court, in a case of first impression, refused to dismiss the case, commenting that the FEHA prohibits employers from requiring transgender workers to use restrooms and locker rooms based on their sex at birth. The defendant-employer's motion for summary judgment is currently pending.
- In 2015, the EEOC ruled in *Lusardi v. McHugh* that the Army discriminated against a transgender woman when it, among other things, required her to use the single-user restroom and would not allow her to use the restroom consistent with her gender identity. The EEOC has taken a consistent position under Title VII on restroom access for transgender workers.[77]

These developments highlight that transgender employees need to be permitted to use the restroom that corresponds with their gender presentation. To provide options for workers, employers can consider creating single-user or unisex restroom facilities, but should not force a transgender employee to exclusively use that facility. In *Lusardi*, the EEOC emphasized that forcing a transgender employee to use only the unisex facility could segregate the employee and perpetuate a sense that the employee is not worthy of equal treatment and respect.

For additional guidance on how to address this sensitive workplace topic, employers can refer to OSHA's *A Guide to Restroom Access for Transgender Workers* at https://www.osha.gov/Publications/OSHA3795.pdf, which the agency developed in alliance with the National Center for Transgender Equality.

Employers with questions relating to restroom usage will want to seek legal advice.

Gender Wage Equality — Fair Pay Act

Both state and federal law provide protections against wage discrimination on the basis of gender.

New 2016

California recently enacted the Fair Pay Act, which revises and expands previous state law (Labor Code section 1197.5) relating to gender pay inequality or disparity and provides greater protections than federal law. The Fair Pay Act is effective **January 1, 2016**.

Under prior state law, you could not pay an employee less than the rate paid to an opposite-sex employee in the same establishment for equal work on jobs that required equal skill, effort and responsibility. However, this standard was removed from California law.

Under the new California Fair Pay Act, employers are prohibited from paying any of their employees less than employees of the opposite sex for "substantially similar work." The term "substantially similar work" replaced the "equal work" for "equal skill, effort and responsibility" standard contained in the prior law.

The burden is on employers to justify pay differentials from an acceptable list of factors that must be applied reasonably. The relied upon factors must account for the entire wage differential.

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[77] *Lusardi v. Dept of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (April 1, 2015)

Unlike FEHA and Title VII, neither the state Fair Pay Act or the federal Equal Pay Act require an employee to show any discriminatory intent.

The California Fair Pay Act also enacts provisions to address "pay secrecy," which the legislature found contributes to the gender wage gap "because women cannot challenge wage discrimination that they do not know exists."

California law provides greater protections than federal law. Other state and federal protections also exist. For more information, see "Other Fair Pay Laws" on page 726.

Proving Unfair Pay

Under the California Fair Pay Act, you are prohibited from paying any of your employees an amount less than employees of the opposite sex for "substantially similar work."[78]

"Substantially similar work" means a composite of skill, effort and responsibility that is performed under similar working conditions. It does not have to be the exact same job title or function.

Employer Burden to Show No Disparity

Paying different wages to employees of different genders who are performing substantially similar work can only be justified if the employer shows all of the following:[79]

- The pay difference is based on one or more of the following four listed factors:
  - 1) A seniority system
  - 2) A merit system
  - 3) A system that measures earnings by quantity or quality of production
  - 4) A bona fide factor other than sex, such as education, training or experience;
- Each factor you rely on is applied reasonably; and
- The one or more factors you rely on account for the *entire* pay difference.

To defend a pay differential based on the fourth factor —"bona fide factor other than sex" — you must also demonstrate that the factor:

- Is not gender based;
- Is job related; and
- Is consistent with "business necessity."

Business Necessity

"Business necessity" is specifically defined under this law to mean that you have an overriding legitimate business purpose and the factor relied upon effectively fulfills the business purpose it is supposed to serve.

If the employee shows that an alternative business practice exists that would serve the same business purpose without creating the pay difference, you cannot rely on this defense.[80]

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[78] Lab. Code sec. 11975(a)

[79] Lab. Code sec. 1197.5(a)(1-3)

[80] Lab. Code sec. 1197.5(a)(1)(D)

Geographic Differences, Shift or Hour Differentials

What happens if employees do not work at the same establishment or even within the same geographic location? The previous version of this law stated that the employee had to show that the pay difference was between employees "within the same establishment."

Under the new Fair Pay Act, the employee does not need to meet this requirement. Employees who claim that they are being paid unfairly based on gender can compare themselves to employees working in different geographic locations.

However, the author of the legislation submitted a letter into the legislative file, stating that differences in geographic locations can be considered a "bona fide factor." The letter also notes that work performed on different shifts or at different times of day can also be considered bona fide factors.[81]

It will be the employer's burden to show that a pay difference based on different geographic location, different shifts, or different times of day is consistent with business necessity and job related, as specified above.

If the pay of an employee in Bakersfield, for instance, is being compared to the pay of an employee in San Francisco it does not automatically disqualify the claim. Instead, the employer must justify why this is a "bona fide factor."

Pay Secrecy Prohibited

Under California's Fair Pay Act, employers cannot prohibit employees from:[82]

- Disclosing their own wages
- Discussing the wages of others
- Asking about another employee's wages
- Aiding or encouraging other employees to exercise their rights under the Fay Pay Act

However, the Act does **not** create an obligation to disclose wages when asked.

It is important to remember that the ability of employees to discuss wages is already protected by other existing state and federal laws, even though the Fair Pay Act also includes this same protection. For more information, see "Discussion of Wages or Working Conditions" in Chapter 10, page 237.

Retaliation Prohibited

The Fair Pay Act also prohibits employers from terminating, discriminating or retaliating against an employee who exercises his/her rights under the Act, assists others in exercising their rights or acts in any way to invoke or enforce the Act, such as bringing a complaint with the Labor Commissioner.[83]

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[81] Senate Daily Journal, Letter from Senator Hannah-Beth Jackson (May 26, 2015)

[82] Lab. Code sec. 1197.5(j)(1)

[83] Lab. Code sec. 1197.5(j)(1)

Fair Pay Act Remedies

The law provides different enforcement methods and remedial measures.

Administrative remedies:

- An employee can file a complaint with the Division of Labor Standards Enforcement (DLSE) that the employer has violated the Fair Pay Act. The DLSE can investigate and enforce any payment owed to the employee(s).[84]
- The Department of Industrial Relations (DIR) or the DLSE can bring a civil action on behalf of the employee and other similarly affected employees to recover unpaid wages, an additional equal amount as liquidated damages and costs of suit.[85]
  - In other words, if $15,000 of wages were owed due to the unlawful wage differential, the employee would get an additional $15,000 in liquidated damages.

Civil remedies:

An employee can bring a civil action for the amount of wages not fairly paid, an equal amount of liquidated damages, interest, costs of suit and reasonable attorneys' fees. A civil action must be brought within two years after the cause of action occurs; if the violation is willful, then the claim must be brought within three years.[86]

An employee who has been retaliated or discriminated against for asserting his/her rights or for protected wage discussions can file a civil action for reinstatement, reimbursement of lost wages and work benefits, interest and other equitable relief. A civil action under this provision must be brought within one year after the cause of action occurs.[87]

Recordkeeping under the Fair Pay Act

You must keep the following employee records for **three years**:[88]

- Wages and wage rates
- Job classifications
- Other terms and conditions of employment

Previously, the law only required recordkeeping for two years.

How to Evaluate Whether a Pay Differential Exists

Employers may want to examine pay rates for the same or substantially similar jobs in light of the California Fair Pay Act. When determining whether a pay differential may exist, group all employees of the same gender that do substantially similar work into one group. This will be the "comparator group" that must be used by the employee to demonstrate a gender wage disparity. When grouping employees, look at the skills, effort and responsibilities of the job as well as the working conditions. For example, if male employees in the comparator group are paid $10,000 more a year than a female employee in the same comparator group, then a gender pay disparity exists.

If a gender pay disparity exists, review the four factors listed above and determine whether, based upon the four factors reasonably applied, the differential is justified and accounts for the entire pay difference. Remember that if you rely on the fourth factor — "bona fide factor other than sex" — you must also demonstrate that the factor is not gender based and is job related and consistent with business necessity, as defined.

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[84] Lab. Code sec. 1197.5(e)

[85] Lab. Code sec. 1197.5(f)

[86] Lab. Code sec. 1197.5(g)-(h)

[87] Lab. Code sec. 1197.5(j)(2)-(3)

[88] Lab. Code sec. 1197.5(d)

Pay close attention to market factors when evaluating whether a pay differential exists. While market factors may be relevant when negotiating a compensation package, market factors alone will not overcome a pay differential.

Additionally, take note of any geographic differences between employees located in different locations. Like market conditions, geographic differences can be considered a "bona fide factor," when justifying the existence of a wage disparity. However, it is no longer the case that geographic differences alone will justify a wage differential.

Because of potential exposure to a Fair Pay Act claim, consider conducting any analysis of pay rates with the advice of an attorney. In addition, documentation of salary decisions is crucial.

Fair Pay Act Guidance

The following are tips to consider:

- Ensure that compensation decisions are based on objective considerations. This includes increases for retention purposes, as well as discretionary bonuses.
- Remember that compensation doesn't just mean straight salary, but includes all forms of compensation, such as bonuses or commissions.
- Document all compensation decisions. This includes all factors relevant to the employee's compensation, such as market factors, geographic location, etc.
- Review job descriptions to ensure that they support salary decisions and reflect actual job duties, functions, skills and responsibilities.
- Ensure that you do not discipline employees for discussing wages and review employee handbooks to remove any prohibitions that may exist.
- Remember that, while an employee can ask about wages, the employer is not required to disclose the wages of other employees.
- Train hiring managers and others that make salary related decisions in compliance with the Fair Pay Act.
- Update, if necessary, your record retention practices to account for the three year record retention requirement under the new law.
- Prohibit retaliation against employees for asserting rights under the Fair Pay Act and ensure that you have a reporting mechanism in place. This can be part of your existing equal employment opportunity policy.

Again, strongly consider working with counsel to develop any fair pay analysis.

Other Fair Pay Laws

In addition to California's Fair Pay Act, the state Fair Employment and Housing Act (FEHA) also prohibits gender discrimination which includes discrimination in compensation decisions.[89]

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[89] Govt Code sec. 12900 et seq.

Moreover, while California law is now broader than federal law, the federal Equal Pay Act,[90] the federal Lilly Ledbetter Fair Pay Act of 2009 and the federal Title VII also prohibit discriminatory compensation decisions

The federal Equal Employment Opportunity Commission (EEOC) has settled several matters involving pay discrimination in recent years and considers it a priority enforcement issue.

Harassment

Although sexual harassment receives the most attention and publicity, harassment on the basis of any protected class status violates federal and state law and is considered a form of discrimination. In addition, prohibitions against harassment on the basis of protected class contain significantly broader coverage than other types of protected class discrimination. Although other FEHA provisions apply only if you have five or more employees, the harassment provisions apply to all employers who employ one or more people or who hire independent contractors.[91] All California employers are prohibited by law from harassment based on belonging to any protected class.

For a complete discussion of sexual harassment, see Chapter 27, "Harassment." That section includes information on guidelines about sexual harassment put in place by the EEOC, the DFEH and the courts. It also contains requirements and recommendations about publishing and circulating a company anti-harassment policy and training employees and supervisors to avoid illegal harassment.

You must provide a workplace free from harassment based on a person's:

- Age
- Gender identity or gender expression
- Genetic information
- Marital status
- Medical condition
- Mental or physical disability
- National origin or ancestry
- Pregnancy (including perceived pregnancy), childbirth, breastfeeding or related medical condition
- Race or color
- Religious creed
- Sex
- Sexual orientation
- Military and veteran status

For example, in *Alexander v. CIT Technology Financing Services, Inc.*, an employee who received consistently satisfactory performance evaluations was also consistently subjected to comments about her age and sexual innuendos from her supervisor. After she was terminated, she claimed she was harassed based on her age and sex. The court agreed, concluding that a hostile work environment harassment claim can be brought under the ADEA.[92]

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[90] 29 U.S.C. 626(b)

[91] Govt. Code sec. 12940

[92] *Alexander v. CIT Technology Financing Services, Inc.*, 217 F.Supp.2d 867 (N.D.Ill. 2002)

In another important case, *Dee v. Vintage Petroleum*, an employee brought a successful hostile work environment harassment claim under FEHA by showing harassment based on identification with a protected class. This female employee faced degrading insults, unwelcome coarse language, threats of termination and an order to spy on a fellow employee. The court concluded that a single negative remark about her ethnicity by a supervisor justified a hostile environment claim.[93]

Marital Status

State law prohibits discrimination on the basis of marital status. Federal law does not prohibit discrimination on the basis of marital status, though some factual situations may be challenged as sex discrimination. FEHA defines marital status as an individual's state of:

- Marriage
- Nonmarriage
- Divorce or dissolution
- Separation
- Widowhood
- Annulment
- Other marital status[94]

You cannot condition fringe benefits or other employment decisions on whether the employee or prospective employee is considered a "principal wage earner" or "head of household." Similarly, you cannot use job responsibilities, such as travel or customer entertainment, as justification for discrimination under this category.

You cannot generally impose a rule that prohibits employment of spouses. However, you can refuse to place one spouse under the direct supervision of the other or to place both spouses in the same department, division or facility if you can show a business reason relating to supervision, safety, security or morale,[95] or if the work involves potential conflicts of interests or other hazards greater for married couples than for other people.[96] In addition, state regulations make exceptions for fringe benefits, such as health insurance plans, permitting you to avoid unnecessary double coverage of both spouses.

California recognizes same-sex marriages as lawful.[97]

New 2016

On June 26, 2015, the U.S. Supreme Court issued a significant decision relating to same-sex marriage rights. In a 5-4 decision, the Supreme Court held that the due process and equal protection clauses of the 14th Amendment guarantee the right of same-sex couples to marry. The Court held that same-sex couples may now exercise the fundamental right to marry in all states and there is no basis for any state to refuse to recognize a same-sex marriage performed in another state.[98]

The Court noted that bans on same-sex marriage curtail central notions of equality, denying same-sex couples benefits afforded to opposite-sex couples and barring them from exercising a fundamental right. According to the Court, "this denial works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians."

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[93] *Dee v. Vintage Petroleum*, 106 Cal. App. 4th 30 (2003)

[94] Govt. Code sec. 12940(a)

[95] Govt. Code sec. 12940(a)(3)

[96] 2 CCR sec. 11057

[97] *Hollingsworth v. Perry*, 130 S.Ct. 705 (2013)

[98] *Obergefell v. Hodges*, 133 S.Ct. 2584 (2015)

Moreover, in a separate decision, the United States Supreme Court ruled that defining the term "spouse" under federal law to exclude same-sex unions is unconstitutional and violates the equal protections afforded by the Fifth Amendment of the Constitution.[99]

Registered Domestic Partnership

Registered domestic partners are opposite sex couples with one partner over the age of 62 or same-sex couples who have registered their relationship with the California Secretary of State.

Where California law prohibits discrimination on account of marital status — for example one's status as a spouse or as a party to marriage — it must be inferred that a similar prohibition exists against discrimination on account of participation in a domestic partnership, past or present.

Extending this reasoning further, it would be unlawful to retaliate against an employee for objecting to discrimination on account of participation in a domestic partnership, or to establish a "no employment of registered domestic partners" rule, subject to the exceptions described in the section on discrimination related to "Marital Status" on page 728.

In administering benefits programs, an insurer may require proof of registered domestic partnership status or termination of that status, but only if the insurer also requests verification of marital status and notification of dissolution of the marriage from an employee whose spouse is provided coverage.

Medical Condition and Genetic Information

Federal and state laws protect an individual with a disability or medical condition that affects his/her ability to perform a job's essential functions or those of a job for which they are applying. These laws also prohibit discrimination against a qualified individual based on a disability or medical condition. You must provide reasonable accommodation for an employee's or applicant's disability or medical condition if, with such accommodation, he/she can perform the job's essential functions without causing undue hardship.

Federal and state laws regulate when you can request or require a physical examination or medical information from an employee or applicant and when you can request or require medical information from a physician about an employee or applicant. These laws also regulate how you can use that information.

Medical condition under state law includes genetic characteristics.[100] Employers are prohibited from taking adverse action based on the presence of a genetic characteristic. Employers are also prohibited from testing for the presence of a genetic characteristic.[101]

California and federal laws also prohibit employers from taking certain actions based on genetic information. It is an unlawful employment practice under FEHA to base an employment decision such as hiring, firing or promoting, on genetic information.[102] Genetic information is also protected under the federal Genetic Information Nondiscrimination Act (GINA).

For more information on discrimination and employers' obligation to accommodate a disability or medical condition, see Chapter 28, "Disabilities in the Workplace." For more information on genetic testing and genetic information, see "Genetic Information Nondiscrimination Act (GINA)" in Chapter 8, page 135, and see "Discrimination on the Basis of Genetic Characteristics or Genetic Information" in Chapter 28, page 830.

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[99] *U.S. v. Windsor*, 133 S.Ct. 2675 (2013)

[100] Govt. Code sec. 12926(i)

[101] Govt. Code sec. 12940

[102] Govt. Code sec. 12940

Military and Veteran Status

The Fair Employment and Housing Act protects employees from discrimination based on "military and veteran status."

Military and veteran status is defined as a member or veteran of the United States Armed Forces, United States Armed Forces Reserve, the United States National Guard, and the California National Guard.[103]

The law provides an exemption for an inquiry by an employer regarding military or veteran status for the purpose of awarding a veteran's preference as permitted by law.[104] Legislation from prior years required veteran preference on civil service employment lists.

California's Military and Veterans Code section 394 also prohibits employers from discriminating against members of the armed forces.

Under federal law, the Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits employment discrimination against a person on the basis of:

- Past military service
- Current military obligations
- Intent to serve

An employer must not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment to a person on the basis of a past, present, or future military service obligation.

In addition, an employer must not retaliate against a person because of an action taken to enforce or exercise any USERRA right or for assisting in an USERRA investigation.

For more information on USERRA, visit the Department of Labor's USERRA compliance page at http://www.dol.gov/compliance/laws/comp-userra.htm.

National Origin

"National origin" has been broadly interpreted to mean the country that the applicant, employee or his/her ancestors came from.[105] An employer cannot discriminate against employees or applicants based on national origin or ancestry.

The definition of national origin discrimination for purposes of the Fair Employment and Housing Act includes discrimination on the basis of possessing a driver's license granted under section 12801.9 of the Vehicle Code. This section of the Vehicle Code allows for a driver's licenses to be issued to undocumented persons if they are able to provide satisfactory proof of identity and California residency. For more information, see "Immigrant Workers and Discrimination/Retaliation Protections" on page 744.

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[103] Govt. Code sec. 12926(k)

[104] Govt. Code sec. 12940(p)

[105] *EEOC v. Townley Engineering and Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988)

English-Only Policies

California law limits your ability to adopt or enforce an "English-only" policy in the workplace.[106]

If you have five or more employees (unless you are a nonprofit religious association or religious corporation), you cannot adopt or enforce a policy that limits or prohibits the use of any language in any workplace, unless:

- The language restriction is justified by a business necessity; and
- You notify employees of the circumstances and time when the language restriction must be observed and of the consequences for violating it.

"Business necessity" means an overriding legitimate business purpose:

- The language restriction is necessary for the business's safe and efficient operation;
- The language restriction effectively fulfills the business purpose it is supposed to serve; and
- An alternative to the language restriction would not accomplish the business purpose equally well with a lesser discriminatory impact.

Under federal law, an employer cannot deny a person an employment opportunity because that person's foreign accent makes them unable to communicate well in English, unless you show that the ability to communicate effectively in English is necessary to the job and a bona fide occupational qualification (BFOQ).[107] For more information on BFOQs, see "Bona Fide Occupational Qualification (BFOQ) as a Discrimination Defense" on page 767. EEOC guidelines generally prohibit English-only policies. For more information, visit the Government Printing Office's website at www.access.gpo.gov/nara/cfr/waisidx_00/29cfr1606_00.html.

Harassment Based on National Origin Is Prohibited

An employer's failure to take reasonable steps to prevent harassment based on national origin is unlawful.

For example, a California court of appeal ruled that an employee may pursue his lawsuit for national origin harassment and discrimination, based on comments made by co-workers following a terrorist attack overseas.[108]

The employee, a Muslim born in Pakistan, faced such remarks such as, "Pakistan is a messed up country," and "Pakistan and Afghanistan need to be bombed." One co-worker allegedly said to the employee, "You're not going to blow me up, right?" The employee also alleged that an Indian supervisor used racial slurs against Chinese engineers.

The appellate court ruled that a reasonable jury could find harassment, and that the case should proceed to trial to permit that determination.

A diverse workplace does not immunize an employer from harassment and discrimination claims. Be aware of the impact that a global political climate can have on the workplace.

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[106] Govt. Code sec. 12951

[107] *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973)

[108] *Rehmani v. Superior Court*, 204 Cal.App.4th 945 (2012)

Pregnancy

Both state and federal law prohibit harassment and discrimination against employees or applicants because of pregnancy or perceived pregnancy. Harassment or discrimination based on pregnancy is considered illegal sex discrimination under state and federal law.[109] For more information, see "Sexual Orientation" in Chapter 26, page 738 and Chapter 19, "Pregnancy Disability Leave (PDL)."

California law prohibits employment discrimination against women on the basis of pregnancy, perceived pregnancy, childbirth, breastfeeding and related medical conditions, which is a form of discrimination based on a person's sex.

In 2012, California adopted pregnancy regulations that made discrimination and harassment against an applicant or employee because of "perceived pregnancy" unlawful. "Perceived pregnancy" is defined in the regulations as "being regarded or treated by an employer or other covered entity as being pregnant or having a related medical condition."[110] It is unclear how the DFEH and state courts will interpret this definition.

Pregnancy and perceived pregnancy discrimination includes:

- Refusing to hire an applicant
- Refusing to select an applicant or employee for a training program that leads to employment or promotion
- Refusing to promote an employee
- Barring or discharging an applicant or employee from employment or from a training program that leads to employment or promotion
- Refusing to provide continued coverage under a group health plan for an eligible employee who takes pregnancy leave
- Discrimination or harassment against an employee because of pregnancy (including perceived pregnancy) or because she exercised her right to take PDL or transfer
- Retaliation for opposing forbidden practices
- Refusing to provide reasonable accommodations for an employee's conditions related to pregnancy, childbirth or related medical conditions
- Refusing to transfer the employee who is affected by pregnancy
- Requiring an employee to take a leave of absence because of pregnancy or perceived pregnancy when the employee has not requested the leave
- Refusing to grant PDL to an employee disabled by pregnancy. For more information, see Chapter 19, "Pregnancy Disability Leave (PDL)"

There are permissible defenses to pregnancy discrimination charges. For more information, see "Defense Against Claims of Discrimination" on page 767.

To support their claims, employees can rely on evidence that other employees (present or former) were treated differently because of their pregnancy.[111]

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[109] 2 CCR sec. 11039; Title VII of the Civil Rights Act of 1964

[110] 2 CCR sec. 11035(r)

[111] *Johnson v. United Cerebral Palsy Inc.*, 173 Cal. App. 4th 740 (2009)

Defending Against a Pregnancy Discrimination Claim

If an employee fails to notify you that she is pregnant and there is no evidence that you knew or should have known of her condition, you have a valid defense against a pregnancy discrimination claim, according to a ruling of a California appeals court.

In *Trop v. Sony Pictures Entertainment, Inc.*, the employee told co-workers in confidence of her pregnancy, but there was no evidence that her supervisor knew. Negative comments from the supervisor about childbearing, by themselves, did not establish prior knowledge of the pregnancy.

The court said that if the pregnancy is not apparent and the employee did not disclose it to her employer, the employee must present evidence to prove that the employer knew.[112]

Race

Title VII of the Civil Rights Act of 1964 and FEHA both prohibit race discrimination in all aspects of employment relationships.

Race discrimination involves treating an applicant or employee unfavorably because he or she is of a certain race or because of personal characteristics that might be associated with a particular race (such as hair texture). Discrimination on the basis of color is also prohibited by state and federal law and involves treating someone unfavorably because of skin color/complexion.

Race or color discrimination can also occur if an applicant or employee is treated unfavorably because he or she is married to or associated with a person of a certain race or color or because of a person's connection with a race-based organization or group or a group that is generally associated with people of a certain color. In *Chacon v. Ochs*, the court applied Title VII protections to a plaintiff's interracial association in a situation in which an employer created a hostile work environment by discriminating against a Caucasian woman because of her husband's Hispanic race.[113]

Discrimination also can occur when the victim and the person inflicting the discrimination are of the same race or color. For example, a darker-skinned Latino can bring a claim for discrimination where a lighter-skinned Latino discriminated against him because of his skin tone.

In *El-Hakem v. BJY, Inc.*, a court ruled that using a nickname can constitute discrimination under certain circumstances, even if the nickname doesn't seem to be offensive because it isn't a racial epithet. An employee of Arabic heritage sued his former employer and his supervisor under federal law. The supervisor repeatedly referred to him by a non-Arabic name in the belief that a "Western" name would be more acceptable to the employer's clients. The employer called him "Manny" instead of his given name, "Mamdouh." The defense argued that no racial discrimination occurred because the name was not a racial epithet.

The Ninth Circuit Court of Appeals rejected the argument, stating that repeatedly using the nickname violated the employee's protection from race discrimination based on ancestry or ethnic characteristics. The court ruled that, although the supervisor's conduct may not have been especially severe, its frequency and pervasiveness were enough for a jury to conclude that it altered the conditions of employment and created a work environment that was racially hostile to a reasonable person of Arabic heritage.[114]

In addition to Title VII and FEHA protections, Section 1981 of the Reconstruction Era Civil Rights Act[115] guarantees all persons, regardless of race, the right to make and enforce contracts. The Civil Rights Act of 1991 amended section 1981 to clarify that the statute applies to all aspects of contractual relationships, including the making, performance, notification and termination of contracts and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.[116] Those who deprive others of their civil rights may be sued and held personally liable for the harm caused by such deprivation.[117]

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[112] *Trop v. Sony Pictures Entertainment, Inc.*, [illegible]

[113] *Chacon v. Ochs*, 780 F. Supp. 680 (C.D. Cal. 1991)

[114] *El-Hakem v. BJY, Inc.*, 415 F.3d 1068 (9th Cir. 2005)

[115] 42 U.S.C. 1981

Title VII and Promotions

Discarding promotion-based exam results that negatively impact a particular race because of a fear of lawsuits is a violation of Title VII, according to the U.S. Supreme Court. The Court did not question an employer's efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the employer's process.

However, after the employer establishes a process and the promotion selection criteria are made clear, the employer cannot invalidate the results. Invalidating the results upsets the employee's legitimate expectation that he/she will not be judged on the basis of race. Title VII does not prohibit an employer from considering how to design the exam or practice before administering it to ensure that all employees are treated fairly regardless of race.[118]

Religion

You cannot deny employment or employment benefits to any employee because of his/her religious creed or lack of one. "Religious creed" is broadly defined to include all aspects of religious belief, observance and practice,[119] including religious dress and grooming practices. For more information, see "Reasonable Accommodation and Religion" on page 735.

The law protects not just traditional organized religions, but also others with "sincerely held" religious beliefs and practices.[120]

The definition of religion necessarily includes the absence of religion. You cannot discriminate against an individual because he/she is an atheist or agnostic. You cannot require an employee to participate in a particular religious observance or practice.[121]

However, religious organizations are permitted to discriminate only on the basis of religion and only for jobs in which "the practice of and belief in the religion of the organization is a legitimate, job-related requirement." The work must be connected with carrying out the organization's religious activities.[122] Religious organizations cannot discriminate against members of other protected classes.

Exemptions for Religious Corporations and Associations

Nonprofit religious corporations and religious associations are generally exempt from California's employment discrimination laws.[123] For example, these employers can require that employees in jobs that involve religious duties must be adherents of the religion.[124]

Special rules apply to religious employers in the health care industry.[125] Hospitals that are owned or operated by religious corporations that provide services to people who do not adhere to that religion and hospitals that are religiously affiliated, nonprofit public benefit corporations generally cannot engage in discrimination or harassment. However, those employers can take a person's religion into account when hiring and promoting executives, pastors, physicians, nurses and other health care providers.

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[116] 42 U.S.C. 1981 (b)

[117] *Al-Khazraji v. Saint Francis College*, 784 F.2d 505 (3d Cir. 1986)

[118] *Ricci v. DeStefano*, 129 U.S. 2658 (2009)

[119] Govt. Code sec. 12926(o)

[120] *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989)

[121] *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987)

[122] 42 U.S.C. 2000e-2; *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972)

[123] Govt. Code sec. 12926(d)

[124] Govt. Code sec. 12922

Reasonable Accommodation and Religion

You must accommodate an applicant's, employee's or unpaid intern's religious creed unless you can demonstrate that the accommodation is unreasonable because it would impose an undue hardship.[126] All aspects of religious belief, observance and practice must be accommodated. California law also specifically includes observances of a sabbath or other religious holy day, and reasonable time off needed for associated travel.[127]

California's religious discrimination protections and reasonable accommodation requirements cover religious dress practices and religious grooming practices. Enforcement agencies have recently focused on employers who segregate employees wearing religious dress, such as head coverings, from jobs that involve public contact. Such employer actions, based on perceived biases or customer preferences, are unlawful.

Government Code sections 12926 and 12940 provide the following definitions:

- "Religious dress practice" is construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts and any other item that is part of the observance by an individual of his or her religious creed.
- "Religious grooming practice" is construed broadly and includes all forms of head, facial and body hair that are part of the observance by an individual of his or her religious creed.

The law specifically states that an accommodation of a religious dress or grooming practice that would require segregation of the individual from other employees or the public is "not reasonable."

An accommodation is not required if it violates any other law prohibiting discrimination or protecting civil rights.

ew 2016

New legislation effective January 1, 2016, specifically clarifies that, under FEHA, the mere act of requesting a reasonable accommodation of a religious belief is a protected activity. An employer cannot discriminate or retaliate against a person for requesting an accommodation — regardless of whether the request was granted.[128]

Under federal law, employers covered by Title VII of the Civil Rights Act of 1964 must make exceptions to their usual rules or preferences to permit applicants and employees to follow religiously-mandated dress and grooming practices unless doing so would pose an undue hardship to the operation of an employer's business.

Reasonable accommodation can include job restructuring, job reassignment, modification of work practices or allowing time off to avoid a conflict with an employee's religious observances.

When determining if a reasonable accommodation would impose an undue hardship on your business operations, consider the following issues:

- Your overall size with respect to the number of employees, number and type of facilities and size of budget.

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[125] Govt. Code sec. 12926.2

[126] 2 CCR sec. 11062

[127] Govt. Code sec. 12940(l)

[128] Govt. Code sec. 12940(l)(4)

- The type of operation, including the workforce or membership composition and structure.
- The nature and cost of the accommodation involved.
- Reasonable notice to the employer of the need for accommodation.
- Any available reasonable alternative means of accommodation.[129]

Reasonable accommodation includes the following specific employment policies or practices:

- Interview and examination times: Scheduled times for interviews, examinations and other functions that are related to employment opportunities must reasonably accommodate religious practices.
- Dress standards: Dress standards or requirements for personal appearance must be flexible enough to take into account religious practices.
- Religious holidays: Some employees' religious holidays may not match other employees' religious holidays. You must reasonably accommodate the full range of your employees' religious beliefs.
- Union dues: An employer or union cannot require membership from any employee or applicant whose religious creed prohibits this membership. An applicant's or employee's religious creed must be reasonably accommodated regarding union dues.

Reasonable accommodation for an employee's religious requirements might include adjusting a required uniform to meet the employee's religious dress needs, if an accommodation does not create an undue hardship on your operations.[130]

The U.S. Equal Employment Opportunity Commission (EEOC) published a question-and-answer guide entitled "Religious Garb and Grooming in the Workplace: Rights and Responsibilities." The publication discusses applicable federal law and provides practical advice for employers and employees. It is available on www.eeoc.gov.

Accommodation of Religious Dress

New 2016

In 2015, the U.S. Supreme Court issued its ruling in the closely followed religious discrimination case, *EEOC v. Abercrombie & Fitch Stores, Inc*. The Court found that Abercrombie engaged in religious discrimination when it refused to accommodate a Muslim applicant because she wore a hijab, an Islamic religious headscarf.[131]

At issue in the case was whether an employer violates Title VII for failing to accommodate an employee's religious practices when the employer had no knowledge of the employee's accommodation request.

The Court ruled that under Title VII of the Civil Rights Act of 1964, "[a]n employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions," regardless of whether the employer had actual knowledge of the applicant's need for an accommodation. To prevail, an applicant needs to show only that the need for an accommodation was a motivating factor in the employer's decision, not that the employer had knowledge of his/her need.

The case involved a 17-year-old, Samantha Elauf, who applied for a job at an Abercrombie Kids store. The applicant wore a hijab, a religious headscarf worn by many practicing Muslims, to her interview.

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[129] 2 CCR sec. 11062

[130] *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984)

[131] *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015)

The assistant manager, Heather Cooke, interviewed Elauf and ranked her style a "6," which was a rating that qualified her to be hired. The assistant manager, however, was concerned that the hijab might violate the store's "Look Policy." She sought guidance from the store manager as to whether the headscarf was a forbidden "cap," but got no answer, so she went to the district manager.

Cooke informed the district manager that she believed Elauf wore the headscarf because of her faith. The district manager stated that the headscarf would violate Abercrombie's Look Policy, as would all other headwear, religious or otherwise. The district manager directed Cook not to hire Elauf. Elauf's interview score was changed and she was not offered a position.

The U.S. Equal Employment Opportunity Commission (EEOC) brought a lawsuit against Abercrombie. The EEOC won at the federal district court, but lost on appeal when the 10th Circuit court ruled that Abercrombie could not be liable for religious discrimination because the applicant never informed the store prior to its hiring decision that she wore the headscarf for religious reasons and Abercrombie, therefore, did not have actual knowledge of her need for an accommodation.

The EEOC then appealed the case to the U.S. Supreme Court, asking the Court to issue a final decision on whether an employer must have actual knowledge of the need for an accommodation in order for there to be a violation under Title VII.

Actual Knowledge Not Required; Can't Discriminate Based On Assumptions

The Court refused to impose a knowledge standard. Instead, the Court noted that federal law prohibits certain *motives* regardless of the actor's knowledge.

It doesn't matter if the employer actually knew of a need for an accommodation or just assumed one might be required and acted on that assumption; as was the case in the facts presented to the Court. In this case, Abercrombie, at the very least, suspected that the headscarf was worn for religious reasons and refused to hire Elauf based on that assumption. Remember, anti-discrimination laws are designed in part to eliminate actions based on stereotypes.

Moreover, the Court noted that religious practices are given "favored treatment," and employers have an affirmative obligation to accommodate religious practices. "Title VII requires otherwise-neutral policies to give way to the need for accommodation," said the Court.

This is not the first case involving Abercrombie. A federal judge ruled in 2013 that the clothing retailer discriminated against a Muslim employee when the company failed to accommodate her wearing of a hijab at work.[132]

During a regularly scheduled visit by a district manager in February of 2010, the employee was informed that her hijab violated Abercrombie's Look Policy. The employee told management that she could not remove the headscarf because it was part of her religion. She was ultimately fired for refusing to remove the scarf.

The court found that Abercrombie engaged in religious discrimination. The court also found that there was no credible evidence that the dress code accommodation would cause undue hardship. The court rejected Abercrombie's argument that an accommodation would threaten the core of its business model and the company's overall success.

The only thing Abercrombie offered as evidence of undue hardship was the personal beliefs or opinions of its own employees that deviations from the Look Policy harmed sales and/or customer experiences in the store.

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[132] *U.S. Equal Employment Opportunity Commission v. Abercrombie & Fitch*, 9[illegible]

Employers will want to work with applicants and employees to determine reasonable accommodations for religious beliefs and engage in the interactive process. A case-by-case determination is required.

Accommodation of Scheduling

In *Opuku-Boateng v. State of California*, the Ninth Circuit Court of Appeals ruled that a change in shift scheduling would be a reasonable accommodation for an employee's religious beliefs. It found that making minor changes in an employee's shift scheduling does not create preferential treatment or impose a severe burden on other employees.[133]

Courts recognize that accommodation for an employee's religious beliefs may not be required when the accommodation would require the employer to assign jobs in violation of a seniority provision in a collective bargaining agreement.[134] Religious accommodation may not be required if it could result in adverse impact on other employees in the absence of a contractual seniority system.[135]

Under state law you must demonstrate that you have explored any available reasonable alternative means of accommodating the religious belief or observance including the possibilities of excusing the person from those duties that conflict with his or her religious beliefs or permitting those duties to be performed at another time or by another person, but that you are unable to make the accommodation without undue hardship.[136] Based on company policies and a collective bargaining agreement, an inability to adjust an employee's schedule for numerous absences for religious observance is not unreasonable. You need not accommodate every employee request for accommodation.[137]

Other Accommodation Issues

In *Peterson v. Hewlett-Packard Co.*, the Ninth Circuit Court of Appeals ruled that a company did not unlawfully discharge a self-described "devout Christian" employee who posted biblical scriptures in his cubicle that were critical of homosexuals. The scriptures were visible to passersby. His supervisor removed the verses, finding them to be offensive and contrary to the company's anti-harassment policy.

The employee said that he posted the scriptural passages to hurt gay and lesbian employees, with the hope the messages would cause them to repent and be saved. He argued that the workplace diversity campaign discriminated against fundamentalist Christian employees. He was terminated for refusing to stop the postings.

The Ninth Circuit Court of Appeals found neither religious discrimination nor any legal obligation to accommodate the employee's beliefs. Requiring the company to accommodate the employee's religious beliefs would have caused an undue hardship on the organization's operations.[138]

Sexual Orientation

Employees in California are protected from employment discrimination based on their actual or perceived sexual orientation.[139] "Sexual orientation" is defined as "heterosexuality, homosexuality and bisexuality."[140]

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133. *Opuku-Boateng v. State of California*, 95 F.3d 1461 (9th Cir. 1996)
134. *Virts v. Consolidated Freightways*, 285 F.3d 508 (6th Cir. 2002)
135. *Weber v. Roadway Express*, 199 F.3d 270 (5th Cir. 2000)
136. Govt. Code. sec. 12940(l)
137. *EEOC v. Firestone Fibers & Textiles*, 515 F.3d 307 (4th Cir. 2008)
138. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004)
139. Govt. Code sec. 12940
140. Govt. Code sec. 12926(q)

Employers of four or fewer employees and religious nonprofit organizations are exempt from sexual orientation anti-discrimination laws.

Laws Prohibiting Discrimination

Many federal and state laws contain prohibitions of discrimination in employment. These laws include the principal federal and state civil rights legislation, plus other laws that regulate the employment relationship. You may face discrimination claims from employees for unexpected reasons. It is important to be familiar not only with FEHA and Title VII, but with other laws as well.

California Constitution

The California Constitution, Article I, section 31, provides that California state government shall not discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity or national origin in public employment, public education or public contracting. The prohibition covers:

- California state government
- Any city, county or city and county
- Any public university system, including the University of California, community college districts, school districts or special districts
- Any other political subdivision or governmental instrumentality of or within California

Bona fide occupational qualifications based on a person's sex, which are reasonably necessary to the normal operation of public employment, public education or public contracting, are permitted. People who are adversely affected by violations are entitled to the same remedies that are available for violations of California anti-discrimination law. For more information on BFOQs, see "Bona Fide Occupational Qualification (BFOQ) as a Discrimination Defense" on page 767.

Article I, section 31, exempts actions that are required to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to California.

The Legislature adopted interpretations of this provision to define racial discrimination to mean any distinction, exclusion, restriction or preference based on race, color, descent or national or ethnic origin that nullifies or impairs a person's recognition, enjoyment or exercise of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life on an equal footing with other persons not of the same race.

In addition, the Legislature determined that there may be no private right of action under this section to challenge any special measures undertaken for the purpose of securing adequate advancement of those racial groups requiring protection. The Legislature also extended the same protections against private rights of action to efforts requiring the government to prove racial discrimination before undertaking special measures for the purpose of securing adequate advancement of those racial minority groups needing that protection.

California's Fair Employment and Housing Act (FEHA)

FEHA[141] prohibits employment discrimination on the basis of race or color, religious creed, national origin or ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex (including pregnancy, childbirth, breastfeeding or related medical condition), gender, gender identity, gender expression, age and sexual orientation.

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[141] Govt. Code sec. 12900 et. seq.

You are covered by FEHA if you:

- Employ, or have employed, five or more employees during 20 or more calendar weeks within the calendar year preceding an alleged violation of the act
- Are a public sector employer, regardless of the number of employees
- Regularly employ one or more people or regularly receive the services of one or more independent contractors (for harassment cases only)

Religious nonprofit organizations are generally excluded from coverage under FEHA. However, FEHA covers you if you are incorporated as a nonprofit religious association or corporation and provide health care to people who are not adherents of the religion.

You cannot, among other things:

- Refuse to hire, segregate or take adverse actions with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, conditions, or privileges of employment on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex (including pregnancy, childbirth, breastfeeding or related medical conditions), gender identity or gender expression, age, military and veterans status or sexual orientation.
- Engage in, or permit your employees or agents to engage in, harassment of any person of any protected class.
- Retaliate against an employee, applicant or independent contractor for opposing sexual harassment or other unlawful discrimination or for filing a complaint, testifying, assisting or participating in an investigation, proceeding or hearing under FEHA.
- Base any adverse employment decision in whole or in part on a person's protected class status.
- Refuse to honor an otherwise eligible employee's request for pregnancy disability leave or for leave under the California Family Rights Act (CFRA).
- Fail to reasonably accommodate an employee's religion or disability, absent an undue hardship.
- Discriminate on the basis of pregnancy, childbirth, breastfeeding or related medical condition, or fail to grant up to four months of pregnancy leave when an employee is unable to work due to pregnancy disability leave.[142] For more information, see Chapter 19, "Pregnancy Disability Leave (PDL)."

FEHA also:

- Prohibits employers from discriminating against workers in unpaid internships, or other limited duration programs that provide unpaid work experience;
- Protects both unpaid interns and volunteers from harassment; and
- Religious accommodation protections also apply to apprenticeship training programs, unpaid internships, or any other program that provides unpaid experience in the workplace or industry.

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[142] Govt. Code secs. 12940, 12945

The Fair Employment and Housing Council has submitted proposed FEHA regulations to the Office of Administrative Law for approval. These proposed regulations include changes to:

- Mandatory harassment training
- Employer written policies
- Prevention and correction
- Expanded definitions

At this time, these proposed regulations are still under consideration.

California's Fair Pay Act

California recently enacted the Fair Pay Act which revises and expands previous state law (Labor Code section 1197.5) relating to gender pay inequality or disparity and provides greater protections than federal law. The Fair Pay Act is effective **January 1, 2016**.

In addition, the state Fair Employment and Housing Act (FEHA), the federal Equal Pay Act[143] (which is part of the federal Fair Labor Standards Act), the federal Lilly Ledbetter Fair Pay Act of 2009 and Title VII also prohibit discriminatory compensation decisions.

For specific information on the Fair Pay Act and prohibitions against wage discrimination on the basis of gender see, "Gender Wage Equality — Fair Pay Act" on page 722.

California Unfair Competition Law (UCL)

A California appeals court significantly raised the extent of potential employer liability with a ruling that the state's Unfair Competition Law (UCL)[144] provides a basis for remedying claims of discrimination in violation of FEHA.

In *Herr v. Nestle U.S.A., Inc.*, an employee filed a lawsuit alleging that he was constructively discharged in violation of FEHA's age discrimination provisions. He also alleged that an employer that practices age discrimination gains an unfair competitive advantage over employers who comply with the law, because older employees generally receive higher pay than their younger counterparts. The employee succeeded on both claims and was awarded more than $5 million on the FEHA claim. The trial court then issued an order permanently forbidding the employer from discriminating based on age, directing the company to advise all employees that it was repudiating an objectionable directive and ordering the company to advise all employees of the court's final judgment.

The appeals court affirmed the employee's right to sue under UCL, ruling that any protections provided by the UCL added to protections that FEHA provides. The court rejected the company's argument that the UCL is intended to protect consumers and competitors but not employees.[145]

The decision affects California employers because:

- It could be argued that employers who discriminate against other protected classes enjoy a similar competitive advantage
- Courts can issue broadly drawn injunctive orders under the UCL

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[143] 29 U.S.C. 626(b)

[144] Bus. & Prof. Code sec. 17200

[145] *Herr v. Nestle U.S.A., Inc.*, 109 Cal. App. 4th 779 (2003)

- Claims may be filed under the UCL by any person acting in his own interests or those of the general public

Protections that the UCL provides are in addition to, and take a more extensive form than, protections under FEHA.

Title VII of the Civil Rights Act of 1964 (Title VII)

You are covered by the discrimination provisions of Title VII[146] if you engage in an "industry affecting commerce" (almost all employers) and employ or have employed 15 or more employees for each working day in 20 or more calendar weeks in the current or preceding calendar year.

Under Title VII you must not, among other things:

- Use an individual's race, color, religion, sex or national origin as a basis for:
  - Failing or refusing to hire an applicant for employment
  - Discharging or otherwise disciplining an employee
  - Determining an employee's compensation, including fringe benefits
  - Determining other terms, conditions or privileges of employment
  - Limiting, segregating or classifying an employee or an applicant for employment in a way that would tend to deprive him/her of an employment opportunity or otherwise adversely affect his/her status as an employee
- Discriminate against an employee or applicant for employment because he/she opposed an employment practice that is unlawful under Title VII
- Discriminate against an employee or applicant because he/she filed a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under Title VII

The Pregnancy Discrimination Act of 1978 (PDA), an amendment to Title VII, requires that you treat a pregnant employee the same as any other employee. When a female employee becomes unable to work due to pregnancy, childbirth or related medical conditions, you must treat her disability the same as any other disability.[147]

The Civil Rights Act of 1991

The Civil Rights Act of 1991[148] amends both Title VII of the Civil Rights Act of 1964[149] and section 1981 of the Civil Rights Act of 1866.[150] The Civil Rights Act of 1991 significantly expands employee rights that the U.S. Supreme Court had narrowed in rulings across the entire spectrum of employment practices, ranging from the interview process to termination criteria. The Civil Rights Act of 1991 also allows jury trials and punitive damages where they were previously unavailable to somebody wishing to bring suit against an employer.

The Civil Rights Acts of 1991 affects all major federal laws about discrimination in the workplace, including all aspects of the Civil Rights Act of 1964, the ADEA,[151] the ADA[152] and the Rehabilitation Act of 1973.[153]

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146. 42 U.S.C. 2000e et seq.
147. 42 U.S.C. 2000e(k) et seq.
148. Public Laws 102-166
149. 42 U.S.C. 2000e et seq
150. 42 U.S.C. 1981
151. 29 U.S.C. 621 et seq.

Age Discrimination in Employment Act of 1967 (ADEA)

You are covered by the ADEA[154] if you are a private sector employer, engage in an "industry affecting commerce" and employ, or have employed, 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year. Public-sector employers are covered regardless of the number of employees.

ADEA's protections are available to employees and applicants who are at least 40 years of age. There is no upper age limit.

Under the ADEA you must not:

- Place an employment notice or advertisement indicating a preference, limitation or specification based on age, except for a BFOQ, such as being 21 years of age or older to serve alcoholic beverages. For more information on BFOQs, see "Bona Fide Occupational Qualification (BFOQ) as a Discrimination Defense" on page 767.
- Use an individual's age as a basis for:
    - Failing or refusing to hire an applicant
    - Discharging or disciplining an employee
    - Setting an employee's compensation or other terms, conditions or privileges of employment
    - Limiting, segregating or classifying an employee or applicant for employment in a way that would deprive him/her of an employment opportunity or otherwise adversely affect his/her status as an employee
    - Reducing an employee's wage rate to comply with other ADEA requirements
- Discriminate against an employee or applicant because he/she opposed an employment practice unlawful under the ADEA
- Discriminate against an employee or applicant because he/she filed a charge, testified, assisted or participated in any manner in an investigation, proceeding or litigation under the ADEA

The ADEA contains five specific exemptions from its prohibition against age discrimination. It is lawful for you to take action if:

- Age is a BFOQ reasonably necessary to business operations.
- The action is based on reasonable factors other than age.
- The action is in observance of a bona fide seniority system.
- The action is in observance of a bona fide employee benefit plan.
- You have good cause to discipline or discharge the employee.[155]

If you are found to have engaged in an employment practice that is unlawful under the ADEA, you can be required to:

- Hire an applicant who was unlawfully denied a job.
- Reinstate an employee who was unlawfully discharged.

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[152] Public Laws 101-336

[153] 29 U.S.C. 791 et seq.

[154] 29 U.S.C. 621 et seq.

[155] 29 U.S.C. 623(f)

- Pay back wages and other benefits that an employee or applicant lost as a result of the unlawful employment practice. You can be required to pay back wages and other benefits for up to two years preceding the date on which the employee filed his/her charge. If your conduct is found to be willful, your liability may extend back three years.
- If the conduct is determined to be willful, pay additional damages equal to the amount of back wages awarded.
- Pay "front pay" until the employee reaches age 70.
- Pay the prevailing employee's or applicant's costs and reasonable attorneys' fees.

A prevailing plaintiff may be entitled to double damages in cases of willful ADEA violations. "Willful conduct" occurs if you know or show reckless disregard for whether your conduct is prohibited by the ADEA.[156]

In *O'Connor v. Consolidated Coin Caterers Corp.*, the U.S. Supreme Court ruled that a person who loses his/her job due to age may file a discrimination lawsuit even if he/she was replaced by another individual who was over 40, if the replacement employee is substantially younger than the terminated employee.[157]

In *EEOC v. Insurance Company of North America*, the Ninth Circuit Court of Appeals ruled that the ADEA does not prohibit employers from adopting policies about hiring overqualified applicants if employers adopt the policies in good faith and apply them evenhandedly.[158] An applicant sued an insurance company for age discrimination after being rejected for being overqualified for a loss control position. The court found that the insurance company's reasons for rejecting the applicant — his background was too technical and engineering-oriented — were legitimate and nondiscriminatory.

Other Federal and State Protections From Discrimination

Prohibitions against discrimination have been incorporated into many other laws. Specifically, many laws protect against retaliation because an employee complained about or disclosed some employer activity, or exercised a protected right.

Immigrant Workers and Discrimination/Retaliation Protections

Although you cannot knowingly hire, refer, recruit or employ unauthorized immigrants, there are still protections against treating immigrants unfairly. These protections are contained in numerous overlapping statutes at the federal and state levels. Moreover, this has been an increasingly active area in terms of both legislation and enforcement on a national and state level. For more information, see "National Origin" on page 730 and Chapter 5, "Verifying Eligibility to Work."

Federal Immigration Protections

Under the federal Immigration Reform and Control Act (IRCA), if you employ four or more people, you cannot discriminate against any individual who is an authorized employee on the basis of national origin or citizenship status.[159]

You cannot refuse to hire a legal employee on the basis of the prospective employee's physical, cultural or linguistic characteristics or national origin because of a presumed higher risk that immigration-related problems may occur. Employees protected under the amnesty provisions of the IRCA as temporary residents also enjoy protection from employment discrimination.[160]

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[156] 29 U.S.C. 626(b)

[157] *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996)

[158] *EEOC v. Insurance Company of North America*, 49 F.3d 1418 (9th Cir. 1995)

[159] IRCA sec. 102

These anti-discrimination provisions apply to all employers with four or more employees. For more information on verifying eligibility for employment, see Chapter 5, "Verifying Eligibility to Work."

The full force and effect of Title VII of the federal Civil Rights Act covers hiring, employing and terminating all employees covered by the IRCA. Specifically, Title VII bans all employment practices that subject individuals to different or unequal treatment because of their national origin. For more information, see "Title VII of the Civil Rights Act of 1964 (Title VII)" on page 742.

Harassment on the basis of national origin is also prohibited. For more information on discrimination related to national origin, see "National Origin" on page 730.

Retaliation is also prohibited by the anti-discrimination provisions found in the Immigration and Nationality Act. You cannot intimidate, threaten, coerce or otherwise retaliate against an individual because:

- The individual filed an immigration-related employment discrimination charge or complaint.
- The individual testified or participated in any immigration-related employment discrimination investigation, proceeding or hearing.
- The individual has otherwise asserted his or her rights under the anti-discrimination provisions in the Immigration and Nationality Act (INA).

Employers who violate INA laws prohibiting unfair immigration-related employment practices may be liable for monetary fines or the workers' legal fees. Employers may also be required to hire or rehire workers, pay back wages or change internal polices to avoid further discrimination.

Consult legal counsel whenever you have concerns about how to handle an immigration-related issue or I-9 documentation issue.

You must check all employees for identification that establishes both identity and employment eligibility to ensure that they are eligible to work in the United States. However, unfair documentary practices during the Form I-9 process (document abuse) are prohibited by the anti-discrimination protections of the INA.

Employees may choose which document(s) they wish to present from the list of acceptable documents.

Limiting the types of documents an employee can present can be an unfair immigration-related employment practice in violation of the anti-discrimination provision of the Immigration and Nationality Act (INA), according to USCIS. The INA prohibits discrimination during the I-9 process and it is enforced by the U.S. Department of Justice (DOJ). For more information, see "Document Abuse" in Chapter 5, page 78.

A DOJ settlement with a California staffing company should remind employers that it is unlawful to discriminate against new hires during the *Form I-9* employment eligibility verification process. The case also highlights the DOJ's scrutiny of employers' paperwork during the *Form I-9* process.

The matter involved allegations that the staffing company discriminated against work-authorized non-U.S. citizens by placing additional documentary burdens on them, in violation of the INA.

The DOJ investigation, which was initiated based on a referral from the USCIS, found that members of the company's staff required non-U.S citizens to present specific documents during the eligibility verification process to establish their work authority that the staff did not require of similarly-situated U.S. citizens.

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[160] 8 U.S.C. 1324b

Citizenship Requirements

It is unlawful to use citizenship as a condition of employment if doing so discriminates against individuals because of their national origin. Though the IRCA prohibits discrimination on the basis of citizenship, the Act specifically states that to prefer a citizen over a non-citizen, where both are equally qualified, is not a violation of federal law.[161]

However, you may not adopt a blanket policy of always preferring citizens over non-citizens.

You must check all employees for identification that establishes both identity and employment eligibility to ensure that they are eligible to work in the United States. However, unfair documentary practices during the *Form I-9* process (document abuse) are prohibited by the anti-discrimination protections of the INA. Procedures for assuring that all employees meet the requirements of federal immigration laws, plus other requirements for employers in this area, are contained in Chapter 5, "Verifying Eligibility to Work."

California Immigration Protections

Under California law, all individuals who applied for employment or who were employed in the state are entitled to all protections, rights and remedies available under state law, except any reinstatement remedy prohibited by federal law, *regardless of immigration status*. This includes state labor, employment, civil rights and employee housing laws. You cannot inquire about a person's immigration status except when necessary by clear and convincing evidence to comply with federal immigration law.[162]

The fact that undocumented workers are entitled to the state's labor and employment protections was also reaffirmed by the California Supreme Court in *Salas v. Sierra Chemical Co.*[163]

California employers must comply with all wage and hour laws, including paying employees and paying them on time, even if the employee is not legally eligible to work in the United States. All California workers — whether or not they are legally authorized to work in the United States — are protected by the state Labor Code regulating wages and working conditions.

If you hire illegal employees, you must pay them. You will be subject to fines and penalties for employing the unauthorized workers. You should not employ a person until you verify his/her eligibility to work by one of the methods discussed in Chapter 5, "Verifying Eligibility to Work." However, when you hire a person, you must pay him/her for all hours worked.

You cannot run wages through payroll without a valid Social Security number. However, payroll can run an employee's wages and give you the calculation of how much money you should pay to the employee and the amount of required withholding. You may have to issue a check or cash through accounts payable to ensure that the person is paid and that you set aside the required withholdings.

Undocumented workers also have the right to file workplace safety and health complaints.

The California Department of Industrial Relations states that it will not question workers about their immigration status, and will:

- Process all wage claims without regard to a worker's immigration status

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161. 8 U.S.C. sec. 1324b(4)

162. Civ. Code sec. 3339; Lab. Code sec. 1171.5; Health and Safety Code sec. 24000; Govt. Code sec. 7285

163. *Salas v. Sierra Chemical Co.*, 59 Cal.4th 407 (2014)

- Hold hearings to recover unpaid wages and represent workers without regard to the worker's immigration status

Undocumented workers also have the right to bring claims of discrimination, harassment or other violation of employment rights or protections.[164]

For more information regarding verifying employment status, see Chapter 5, "Verifying Eligibility to Work."

Use of False Documents

Federal immigration laws require employers to verify employees' identity and eligibility to work. Immigration laws also impose civil and criminal sanctions against employers and employees who knowingly hire, refer, recruit or continue to employ individuals who are not authorized to work in the United States. At the same time, federal law prohibits employers from rejecting documents that reasonably appear to be genuine and relate to the employee presenting them.

Employers may question what to do if they find out that someone they hired submitted fraudulent documents for employment and is actually an unauthorized worker. California law may still entitle the unauthorized worker to many California labor and employment protections.

In *Salas v. Sierra Chemical Co.*, the California Supreme Court allowed an unauthorized worker who had been using a false Social Security number to proceed with his disability discrimination and retaliation lawsuit because state law provides job protections "regardless of immigration status." The court allowed back pay damages up until the employer discovered the employee was unauthorized to work.[165]

The employer argued that this false documentation barred the employee from suing because he violated federal immigration law. The court, however, disagreed and held that California laws protecting workers against wrongful employment practices extend to those workers who, in violation of federal law, use false documents to secure employment.

The state Supreme Court ruled that the unauthorized worker is entitled to employment protections for the period of time up until the employer discovered the employee was unauthorized to work. In this case, the employee could recover lost wages earned during his employment so long as the employer remained unaware of his unauthorized status.

Although federal law prohibits using false documents to get a job, it "does not prohibit an employer from paying, or an employee from receiving, wages earned during employment wrongfully obtained by false documents, so long as the employer remains unaware of the employee's unauthorized status," the court stated in its ruling.

If an employer complies with the verification requirements when hiring an individual but later discovers the employee is an unauthorized worker, employers are advised to discuss the situation with legal counsel. Moreover, California law prohibits employers from taking action against employees who update their personal information, including Social Security numbers. Again, consult legal counsel. For more information, see "Verifying Social Security Numbers" in Chapter 3, page 44.

Unfair Immigration-Related Practices

California also provides strong protections for immigrant workers who complain about unfair wages or working conditions.

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[164] Govt. Code sec. 7285

[165] *Salas v. Sierra Chemical Co.*, 59 Cal.4th 407 (2014)

Labor Code section 1019 prohibits an employer from engaging in “unfair immigration-related practices” against a worker in retaliation for exercising a legal right protected under the Labor Code or any local ordinance applicable to employees.

The intent of the law is to protect immigrant workers from being taken advantage of by employers who do not comply with the state’s wage and hour laws and laws governing working conditions.[166]

Protected worker activities include:[167]

- Filing a complaint or informing any person of an employer’s or other party’s alleged violation of the Labor Code or a local ordinance, if the complaint or disclosure is made in good faith
- Seeking information regarding whether an employer or other party is in compliance with the Labor Code or a local ordinance
- Informing a person of his/her potential rights and remedies under the Labor Code or a local ordinance
- Assisting another in asserting his/her rights

An “unfair immigration related practice” is as any of the following practices when taken for retaliatory purposes:[168]

- Requesting more or different documents than are required under federal immigration law, or a refusal to honor documents tendered pursuant to federal law that, on their face, reasonably appear to be genuine
- Using the federal E-Verify system to check the employment authorization status of a person at a time or in a manner not required under federal law or not authorized under any memorandum of understanding governing the use of the federal E-Verify system
- Threatening to contact or contacting immigration authorities
- Threatening to file or the filing of a false police report or a false report or complaint with any state or federal agency

For instance, an employer may not threaten to contact, or contact, immigration authorities because an employee complained that he/she was paid less than the minimum wage.

The law creates a rebuttable presumption that an employer who engages in an unfair immigration-related practice within 90 days of an employee exercising a protected right has engaged in retaliation.[169]

The law specifically states that employer conduct undertaken at the express and specific direction or request of the federal government is not unlawful.

Employers who engage in unfair immigration-related practices will face various penalties, including an employee's right to bring a civil action and potential suspension of certain business licenses, with the length of the suspension depending on the number of prior violations and several factors set forth in the statute. The law defines “violation” as “each incident when an unfair immigration practice was committed, without reference to the number of employees involved in the incident.”

For more information on verifying employment status, see Chapter 5, “Verifying Eligibility to Work.”

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[166] Assembly Bill 263 (2013)

[167] Lab. Code sec. 1019(a)

[168] Lab. Code sec. 1019(b)

[169] Lab. Code sec. 1019(c)

Reporting or Threatening to Report Immigration Status

In addition to the protections against unfair immigration-related practices found in Labor Code section 1019, employees have additional protections from retaliation based on citizenship or immigration status.

Labor Code section 244 provides that reporting or threatening to report the suspected citizenship or immigration status of an employee, former employee, prospective employee or a member of their family because the person has exercised a right under the Labor Code, Government Code or Civil Code constitutes an unlawful "adverse action" against the individual for purposes of establishing a violation of the individual's legal rights.[170] This law is broader than just complaints about wage and hour claims. It also covers other rights, such as bringing a discrimination or harassment complaint under the Government Code.

Reports (or threats to report) to a federal, state, or local agency are covered.

"Family member" means a "spouse, parent, sibling, uncle, aunt, niece, nephew, cousin, grandparent, or grandchild related by blood, adoption, marriage or domestic partnership."

Supervisors and managers should be trained that using, or threatening to use, employees' or applicants' suspected immigration status against them can amount to unlawful conduct.

Business and Professions Code section 494.6 permits the state to suspend or revoke an employer's business license where the employer makes a report or threat to report suspected immigration status in violation of Labor Code section 244.

Penal Code section 519 also clarifies that a person may be guilty of criminal extortion if the person threatens to report the immigration status or suspected immigration status of an individual, or his/her relative or a member of his/her family.

Driver's License Protections

It is unlawful for an employer to discriminate against an individual because he/she holds or presents a driver's license granted under section 12801.9 of the Vehicle Code. This section of the Vehicle Code allows for driver's licenses to be issued to persons who are not in the country legally, if they are able to provide satisfactory proof of identity and California residency. These licenses allow the holders to drive but do not "establish eligibility for employment, voter registration, or public benefits."

The California Department of Motor Vehicles (DMV) began issuing these driver's licenses in 2015. They are sometimes referred to as "AB 60 licenses," referencing the bill that made these licenses legal.

Discrimination on the basis of holding one of these driver's licenses is a violation of the Fair Employment and Housing Act and constitutes national origin discrimination.[171]

Importantly, it is also a violation of FEHA for an employer to even require a person to present a driver's license, unless possessing a driver's license is:[172]

- Required by law; or
- Required by the employer and the employer's requirement is otherwise permitted by law.

The law neither limits nor expands an employer's authority to require a person to possess a driver's license.

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170. Lab. Code sec. 244(b)

171. Vehicle Code sec. 12801.9(h)(2); Govt. Code sec. 12926

172. Vehicle Code sec. 12801.9(h)(2)

Unless driving is required for the job, there is no reason to ask a new hire or current employee to show a driver's license. Asking for a driver's license can be a violation of FEHA. For more information, see “Requesting a Driver’s License” in Chapter 3, page 42.

Critically, actions taken by an employer that are required to comply with federal I-9 verification requirements under the Immigration and Nationality Act (INA) do not violate California law. The Vehicle Code provisions relating to this special license do not affect an employer's rights or obligations under the federal INA. For more information, see “California Drivers’ Licenses” in Chapter 5, page 79.

Any driver's license information that is obtained by an employer:[173]

- Is to be treated as private and confidential;
- Is exempt from disclosure under the California Public Records Act; and
- Cannot be disclosed to any unauthorized person or used for any purpose other than to establish identity and authorization to drive.

Health Care Employees and Discrimination Protection

State law protects employees of health facilities from discrimination or retaliation if they:

- Present a grievance or complaint relating to the facility’s care, services or conditions
- Initiate or cooperate with a government investigation relating to the facility’s care, services or conditions[174]

Under the Health and Safety Code, “discriminatory treatment of an employee” includes discharge, demotion, suspension, any other unfavorable changes in the terms or conditions of employment or the threat of any of these actions.

If you knew of the employee’s initiation, participation or cooperation in an investigation, or that the employee presented a grievance or complaint, any discriminatory action you take that occurs within 120 days of filing the grievance or complaint creates a presumption of retaliation.

Violating the law can result in a civil fine of $25,000. Willful violation of the law is a misdemeanor and punishable by a fine of up to $20,000. The employee who was discriminated against is entitled to reinstatement, reimbursement for lost wages and work benefits and the legal costs associated with pursuing the case.

Similar protections exist for employees of long-term care facilities.[175]

Workers’ Compensation and Discrimination Protections

It is illegal to discharge, threaten or discriminate against an employee because he/she received an award from, filed or intends to file a workers’ compensation claim.[176] If you demote or transfer an employee because he/she filed or intends to file a claim or received a workers’ compensation award, the action constitutes unlawful discrimination. If you are found to have violated the law, you face financial penalties of up to $10,000. Further, you may be required to reinstate the employee and reimburse him/her for lost wages and benefits. Because it is difficult to answer a discrimination charge, you should not take any adverse action against an employee who is on workers’ compensation without substantial written evidence of a job-related reason for discharging, demoting or transferring that employee. For more information, see Chapter 25, "Workers' Compensation."

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[173] Vehicle Code sec. 12801.9 (i)

[174] Health and Safety Code sec. 1278.5; Govt. Code sec. 12940(g), (h)

[175] Health and Safety Code sec. 1432

[176] Lab. Code sec. 132(a)

Lawful Conduct Outside of Work and Discrimination Protections

You cannot discriminate against employees or applicants on the basis of lawful conduct that they engage in during non-working hours away from your premises, according to the California Labor Code.[177]

This section of the Labor Code is enforced by the California Labor Commissioner. By way of comparison, most anti-discrimination laws are enforced through the civil court system, usually after a person files a claim with the DFEH or the EEOC.

Examples of protected lawful conduct are:

- Exercising free speech rights
- Engaging in political activity
- Reporting information to the government, if the employee reasonably believes that the information discloses a violation of state or federal law
- Complaining of unpaid wages or other Labor Code violations during non-work hours

Although this section of the Labor Code appears to have been created mainly to protect constitutional rights such as free speech and political activity, it also protects "the exercise ... of any rights afforded" to an employee or applicant under the Labor Code.[178] For more information, see "Wage and Hour Enforcement and Penalties" in Chapter 10, page 229.

For example, this could include protection for employees who take a second job — known as "moonlighting" (but exceptions exist for a direct conflict of interest that causes a substantial disruption to business).

This section of the Labor Code exempts:

- State and local law enforcement agencies
- Certain religious organizations
- Certain media employers

This section of the Labor Code does not override employment contracts that:

- Protect you against conduct that is actually in direct conflict with your essential interests if the conduct would disrupt your operation.
- Protect a firefighter against diseases presumed to be caused by employment by limiting the use of tobacco products on or off the job.

The law specifies it "does not affect in any way existing law regarding employment discrimination related to the consumption of tobacco products." Currently no law prohibits employment discrimination against those who use tobacco products.

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[177] Lab. Code secs. 96 (k), 98.6

[178] Lab. Code sec. 98.6; *Ginzi v. San Diego Hospice Corp.*, 120 Cal.App.4th 72 (2004)

Political Activity and Discrimination Protections

Under California Labor Code sections 1101 and 1102, employers are prohibited from acting against their employees based on their political beliefs and activities. In one case, a California court found that a newspaper editor who was fired after publicly stating his support for a mayoral candidate had a cause of action for wrongful termination.[179]

Public Assistance and Discrimination Protections

Employees who are enrolled in public assistance programs, which is defined as meaning the Medi-Cal program, are entitled to certain protections.

An employer is prohibited from:[180]

- Discharging, discriminating or retaliating in any manner against an employee who enrolls in a public assistance program;
- Refusing to hire a beneficiary because they are enrolled in a public assistance program; and
- Disclosing to any person or entity that an employee receives or is applying for public assistance, unless otherwise permitted by state or federal law.

"Employer" is defined by the law as an individual or organization that employs 100 or more beneficiaries of the Medi-Cal program to work in this state.

This new law also requires state agencies to prepare an annual list of the top 500 employers with the most number of employees enrolled in a public assistance program. The reports will be made public and will be prepared starting in January 2016. The anti-discrimination protection was intended, in part, to ensure that employers would not discriminate against Medi-Cal beneficiaries in order to keep their names off the public lists.

Only individuals enrolled in a public assistance program for six consecutive months within the preceding budget year and employed by the same employer for at least one quarter or three months are counted as "beneficiaries" under this law. Moreover, individuals who are enrolled in Medi-Cal because of disability or being under 18 or over 65 years of age are not counted.

Employees cannot be unlawfully denied the benefits of any program or activity that is funded by or receives funds from the state. Employees also cannot be subjected to discrimination under any program or activity that is conducted, operated or administered by the state or by any state agency, is funded directly by the state or receives any financial assistance from the state.[181]

California Codes and Discrimination Protections

The California Labor Code and Government Code prohibit discrimination in employment on many public policy grounds. In addition to other subjects discussed in this section, you are prohibited from discriminating or retaliating against an employee for:

- Filing a claim with the Labor Commissioner or making complaints of unpaid wages[182]
- Filing an Occupational Safety and Health Administration (OSHA) complaint[183]

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[179] *Ali v. L.A. Focus Publication*, 112 Cal.App.4th 1477 (2003)

[180] Govt. Code sec. 13084

[181] Govt. Code sec. 11135

[182] Lab. Code sec. 98.6

[183] Lab. Code sec. 6310

- Disclosing information to a government or law enforcement agency[184]
- Serving on a jury[185]
- Disclosing illiteracy[186]
- Attending a requested meeting at a suspended child's school, if the employee is a parent or guardian and gives reasonable notice[187]
- Attending a child's school activity[188]
- Taking time off as a result of being a victim of domestic violence, sexual assault or stalking[189]
- Status of being a victim of domestic violence, sexual assault or stalking
- Taking time off to train for or participate in emergency firefighting, law enforcement or emergency rescue duty[190]
- Refusing to submit to a polygraph, lie detector or similar test[191]
- Disclosing information to a government or law enforcement agency or to a person with authority over the employee or authority to investigate, discover or correct the violation, if the employee reasonably believes that the information discloses a violation or noncompliance with state, local or federal law or regulations[192]

Protection for Discussing Working Conditions

Employers are prohibited from discriminating or retaliating against an employee for disclosing the amount of employees' wages or salary or information on working conditions to other people. You cannot discharge, discipline or otherwise discriminate against employees who do disclose the amount of their wages or information about working conditions.[193] For more information, see "Wage and Hour Enforcement and Penalties" on page 229.

It is unlawful to require an employee to sign a waiver or other document in which the employee agrees to refrain from disclosing wages or working conditions. The law, however, provides protection for an employer's proprietary information, trade secrets or other privileged information.[194]

In addition, under California's Fair Pay Act, employers cannot prohibit employees from disclosing their wages, discussing the wages of others or asking about another employee's wages.[195] However, the Act does not create an obligation on anyone to disclose wages when asked. The Fair Pay Act prohibits employers from terminating, discriminating or retaliating against who engages in protected activity. The law creates a private right of action for retaliation and discrimination. For more information, see "Gender Wage Equality — Fair Pay Act" on page 722.

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[184] Lab. Code secs. 1102.5-1102.8

[185] Lab. Code sec. 230(a), (b)

[186] Lab. Code sec. 1041

[187] Lab. Code sec. 230.7; Educ. Code sec. 48900.1

[188] Lab. Code sec. 230.8

[189] Lab. Code secs. 230(c), 230.1

[190] Lab. Code secs. 230.3, 230.4

[191] Lab. Code sec. 432.2

[192] Lab. Code secs. 1102.5-1102.8

[193] Lab. Code secs. 232, 232.5

[194] Lab. Code sec. 232.5

[195] Lab. Code sec. 1197.5

National Labor Relations Act (NLRA)

The NLRA[196] is designed to protect employees' rights to organize and form unions or to engage in other efforts of mutual aid and protection. The NLRA enforces that right by prohibiting certain actions of both employers and unions as "unfair labor practices." For more information, see Chapter 31, "Labor Relations in Private Employment."

Under the NLRA, you cannot:

- Discriminate against any employee when hiring, granting tenure or determining another term or condition of employment to encourage or discourage membership in a labor organization
- Discharge or otherwise discriminate against an employee because he/she filed charges or testified pursuant to the provisions of the NLRA
- Discriminate against employees for engaging in concerted activity related to terms and conditions of employment

If you are found to have engaged in an unfair labor practice under the NLRA, you can be required to:

- Cease and desist any further unfair conduct.
- Reinstate an employee who has been unlawfully discharged.
- Pay back wages and restore benefits that an employee lost as a consequence of your unfair labor practice.

The California Agricultural Labor Relations Act contains similar procedures and protections for agricultural employees in California.[197]

Miscellaneous Workplace Discrimination Issues

Managers and HR officers must also be aware of other anti-discrimination laws, some of which pose unique challenges for employers. Often, the laws require you to balance the rights of one employee against the rights of another employee.

This section discusses some common issues that you face when you want to impose standards on employees.

Discrimination Versus Free Speech

An employee who uses racial slurs at work may attempt to argue that requiring him to refrain from doing so violates his free speech rights. However, the California Supreme Court decision in *Aguilar v. Avis Rent A Car System, Inc.* confirmed that you can order employees to stop using derogatory racial and ethnic slurs in the workplace. The California Supreme Court ruled that the right to free speech guaranteed by the First Amendment does not protect racial slurs.[198]

If you do not create a work environment free from harassment on your own, judges have the power to force you to do so.

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[196] 29 U.S.C. 151, et seq.

[197] Lab. Code sec. 1160 et seq.

[198] *Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal. 4th 121 (1999), cert. denied May 22, 2000

Dress Standards

Requiring reasonable dress and grooming standards of employees is not a discriminatory practice. Appropriate business attire may be different for men and women where there is a clear, nondiscriminatory rationale. For example, women may be allowed to wear their hair long while men may be required to have short hair, based on your need to present a professional business image. However, women cannot be prohibited from wearing pants in the workplace.[199]

The Ninth Circuit Court of Appeals ruled that a dress code that requires women to wear makeup does not constitute unlawful sex discrimination under Title VII of the Civil Rights Act of 1964.

In *Jespersen v. Harrah's Operating Co.*, the employer established general standards for all employees in an effort to upgrade the appearance of employees who interacted with the public. Female beverage servers were required to wear stockings, nail polish and makeup and to wear their hair teased, curled or styled. Male beverage servers were prohibited from wearing makeup or colored nail polish and were required to have short hair and neatly trimmed fingernails. A female employee refused to comply and was fired.

The court said that different grooming and appearance standards for men and women do not constitute sex discrimination under Title VII, unless they are based on:

- Unchangeable characteristics associated with an employee's sex
- Changeable factors, but which place an unreasonably greater burden on one sex than the other

This employer's standards were not based on unchangeable sex characteristics, nor did the court believe they placed significantly differing burdens on men and women.

Employers that wish to enact similar types of dress code requirements should approach this issue cautiously and only after consultation with counsel. Although the decision in *Jespersen v. Harrah's Operating Co.* was confirmed by the full court (*en banc*) in the Ninth Circuit Court of Appeals, the result might have been different if the plaintiff had presented better evidence that the employer's standards placed a significantly greater burden on women than on men.[200]

You must reasonably accommodate an employee's religious creed that affects his/her dress standards, physical appearance or grooming.[201]

FEHA specifically protects religious dress and grooming practices. Dress and grooming policies cannot discriminate against employees on the basis of religion, unless you can demonstrate undue hardship or a safety concern. It may be considered undue hardship for you to totally abandon an otherwise reasonable uniform, clothing or grooming requirement if it relates directly to bona fide and identifiable business reasons, or if mandated by government occupational safety regulations.[202]

It is not a reasonable accommodation of a religious dress or grooming practice to segregate the employee from the public.

To prevent the risk of discrimination claims, carefully consider if particular dress requirements are truly job related. For more information, see "Reasonable Accommodation and Religion" on page 735.

California employers must allow an employee to appear or to dress consistently with his/her gender identity or gender expression.[203] For more information, see "Sexual Orientation" on page 738.

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[199] Govt. Code sec. 12947.5

[200] *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006)

[201] EEOC Compliance Manual

[202] *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988)

[203] Govt. Code sec. 12949

Tattoos and Piercings

Discrimination laws do not protect people who suffer adverse employment actions because of their tattoos and body piercings. You are free to create policies that prohibit visible tattoos and body piercings. These policies can differ for men and women, such as men not being permitted to wear earrings.

However, these policies cannot discriminate against employees on the basis of religion unless you can demonstrate undue hardship or a safety concern.

Height and Weight Standards

You cannot establish height or weight standards that discriminate against protected classes. If you can show that a weight or height restriction relates directly to and is an essential function of the job, then selecting job candidates according to justifiable height and weight standards is not discriminatory.

A California Supreme Court decision in *Cassista v. Community Foods* determined that a person's weight is not a disability under FEHA unless medical evidence demonstrates that the weight results from a physiological condition that affects a basic bodily system and limits a major life function.[204] However, recent amendments to federal disability laws may make it easier for an employee to claim that severe obesity is a protected disability. For more information, see Chapter 28, "Disabilities in the Workplace."

Check local ordinances where you conduct business to determine if the local government has passed regulations about height and weight standards. The cities of San Francisco and Santa Cruz, for example, passed local ordinances that prohibit employment discrimination based on weight.[205]

Discrimination Claims and Lawsuits

Employees have the right to pursue remedies for discrimination with both state and federal agencies and in both state and federal courts. The outcome of a claim will often hinge on the jurisdiction where the claim is heard. If properly handled, you may be able to convince one agency to defer processing a claim that is pending before another agency. Your attorneys may seek to litigate a case in one court system rather than another because of some perceived advantage. In any case, knowledge of the procedural aspects of responding to a claim is invaluable and may determine the success of a defense.

Consider encouraging or requiring the use of alternate dispute resolution techniques to resolve employment discrimination claims. Both the EEOC and the DFEH established mediation processes to encourage early and informal claim settlement. In addition, many employers attempt to convince or require employees to resolve discrimination issues through the use of arbitration.

Because of the complexity of dealing with employment discrimination claims, consult with counsel or other experienced resources immediately upon receiving notice of a discrimination claim against your company.

Filing a Discrimination Claim Under Federal Law

An employee who believes that he/she has been discriminated against on the basis of race, color, religion, sex and/or national origin must file a charge with the EEOC to begin the claim process under Title VII. The EEOC investigates the charge and attempts to convince the parties to reach a mutually satisfactory settlement. If a settlement is not forthcoming, the EEOC may file a suit in federal district court on the employee's behalf. More often, however, the EEOC issues the employee a right to sue letter, that advises the employee that he/she can file a suit in federal district court.

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[204] *Cassista v. Community Foods Inc.*, 5 Cal. 4th 1050 (1993)

[205] San Francisco Administrative Code Chapter 12A and Police Code Article 33; Santa Cruz Municipal Code sec. 9.83.030

Employees must file a charge with the EEOC within 180 days of the alleged violation. If a charge is first filed with the DFEH, then a charge can be filed with the EEOC within 300 days or within 30 days of receiving notice that the state terminated its proceedings, whichever is earlier.

In applying these time limits, the U.S. Supreme Court distinguished between cases that allege separately identifiable acts of discrimination and cases that allege the creation of a hostile work environment. Time limits are strictly enforced when a single act, such as discharge, failure to promote or refusal to hire, is alleged to be discriminatory. Conversely, if the cumulative effect of a series of incidents over a period of weeks or years created a hostile work environment, liability exists if at least one of the events occurred within the applicable time limit.[206]

If you are found to have engaged in an employment practice that is unlawful under Title VII, you can be required to, among other things:

- Hire an applicant for employment who was unlawfully denied a job.
- Reinstate an employee who was unlawfully discharged.
- Pay back wages and other benefits that an employee or applicant lost as a result of your unlawful employment practice.
- Pay the prevailing employee's or applicant's costs and attorneys' fees.
- Pay compensatory damages, including damages for emotional injuries.

Class Action Discrimination Lawsuits

Class action litigation has been on the rise in recent years. An employee who feels that he or she has been discriminated against may attempt to join other employees into one lawsuit against the employer. To bring a class action lawsuit, the employee must have the class "certified." To certify the class, the employee must show commonality of the claims — that there are common questions of law or fact amongst all the employees in the potential class that are capable of class-wide resolution.

Class action litigation is costly and time consuming. Employers often settle class action claims because of the high cost of defending such claims and the uncertainty involved.

The U.S. Supreme Court blocked "one of the most expansive class actions ever," ruling that 1.5 million female employees could not file a class action discrimination lawsuit against Wal-Mart.[207] The Court ruled that the large class of employees from stores nationwide did not share common questions that could be resolved in a single class action suit. The Court ruled that the lawsuit was too large and the claims too varied to be certified. The employees in the potential class held a multitude of jobs at different levels of Wal-Mart's hierarchy, held jobs for variable lengths of times, held jobs in 3,400 stores sprinkled across 50 states, were subject to a variety of regional policies and had various levels of performance — from excellent to poor.

- Class-certification may be appropriate if "significant proof" exists of a policy of general discrimination. If the workers can identify a specific employment practice that tied their claims together, class certification of all the claims may be possible.

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[206] *National Railroad Passenger Corporation v. Morgan*, 122 S.Ct. 2061 (2002

[207] *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011)

Employers may want to consider the following steps to help them comply with the law:

- Institute anti-discrimination/anti-harassment policies and practices and clearly communicate them to all employees
- Provide additional training to managers and other decision-makers aimed at eliminating cultural stereotypes and ensuring adherence to company anti-discrimination policy
- Implement and enforce penalties for any employee who does not comply with the anti-discrimination policies
- Make certain that penalties are consistently enforced on a company-wide basis
- Periodically audit pay, promotion and disciplinary practices to look for signs of potential discrimination against one or more protected classes

Franchisee Cannot Sue for Employment Discrimination

In *Adcock v. Chrysler Credit Corporation*, the Ninth Circuit Court of Appeals ruled that an individual who is denied a franchise cannot sue for employment discrimination. After Chrysler Credit Corporation refused to award her an automobile dealership, Sherrie Ann Adcock filed a lawsuit alleging sex discrimination under Title VII. The court found that Chrysler and Adcock contemplated an "independent contractual affiliation" rather than an "employment relationship."[208]

However, if the franchisor exercises control over the franchisee's day-to-day operations, franchisor liability may exist.

For information on franchisor liability in harassment cases, see "Franchisor Liability for Sexual Harassment" in Chapter 27, page 805.

Employers Liable for Inaction by Supervisors

In *Swinton v. Potomac Corp.*, the Ninth Circuit Court of Appeals upheld an award to an employee who was subjected to repeated racial slurs in the presence of a supervisor who did nothing to stop or report the incident to higher management. This case was decided under the Civil Rights Act of 1866, 42 U.S.C. 1981 and a state civil rights statute. As with claims brought under FEHA, there is no cap on damages, which permitted a jury to award $1 million in damages along with $5,612 in back pay and $30,000 for emotional distress.

The company published a policy forbidding discrimination, indicating that supervisors should be responsible to receive and act upon complaints. The court concluded that despite the policy's existence, the company was liable for punitive damages where the inaction of even low-level supervisors permits the unlawful conduct to continue.

The court rejected the employer's request to reduce the amount of punitive damages because of actions the employer took after litigation began. The court said that evidence of employer action upon learning of a complaint could be presented at trial as a factor to be considered when awarding punitive damages, but the court refused in this case, saying that the company's actions were too little too late.[209]

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[208] *Adcock v. Chrysler Credit Corporation*, 166 F.3d 1290 (9th Cir. 1999)

[209] *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001)

The court's opinion emphasizes the importance of giving supervisors the training and authority to deal with discrimination. Supervisors must be held accountable for maintaining a workplace free of harassment. They must report incidents of harassment to management whenever they observe it. The court's comments encourage employers to take prompt action upon learning that a supervisor failed in these responsibilities in an effort to reduce the size of a punitive damage award.

Civil Rights Act Provisions Extend Time to Sue

The U.S. Supreme Court ruled that the time limit for bringing a lawsuit under 42 U.S.C. Sec. 1981 of the Civil Rights Act of 1866 is governed by federal law rather than the state personal injury statute of limitations. Thus, claimants can take four years to file a claim alleging racial discrimination under this law.

In addition, in *Johnson v. Lucent Technologies, Inc.*, a federal court held that the time limit for bringing a retaliation lawsuit under section 1981 is four years.[210]

Filing a Discrimination Charge Under State Law

An employee who believes that he/she has been discriminated against in violation of FEHA must file a charge with the DFEH to begin the claim process under FEHA. The DFEH may investigate the charge.

Under state law, the individual must file a charge within one year of the alleged violation.[211] This deadline may be extended by 90 days if the individual learns of the alleged violation after the expiration of one year from the date of the occurrence.[212] The deadline may be extended by one year if the employee files a claim against the wrong employer because the wrong employer was listed on the employee's *Form W-2*.[213]

Once an employee files a complaint with the DFEH, the employee has two choices. The employee can request an immediate "right to sue" notice and proceed to civil court with a lawsuit. Alternatively, the employee can choose to have DFEH investigate the complaint.

If the employee chooses the immediate "right to sue" notice, the employee waives any right to have DFEH investigate. The employee has one year after receiving the right to sue notice from the DFEH to file a civil lawsuit.

If the DFEH has deferred investigation of a charge to the EEOC, the one-year time limit for filing a civil suit is "tolled," or suspended. A deferral can occur if the claimant filed a concurrent charge with the EEOC and the DFEH, or if the DFEH itself defers the charge to the EEOC for investigation. In certain cases, the EEOC, on deferral from the DFEH, reviews the evidence in the case or conducts additional investigation. This delay also tolls the one-year time limit. In these cases, the right to file a civil suit expires when the federal right to sue period expires, or one year from the date of the DFEH right to sue notice, whichever is later.[214]

If the employee chooses to have DFEH investigate the complaint, the DFEH serves a copy of the complaint on the employer, labor organization or employment agency that is charged with the violation, unless the person who is making the claim is represented by a private attorney. The attorney must serve the complaint either personally or by certified mail, with return receipt requested. The complaint must be served at the first contact with the alleged violator or within 60 days of filing, whichever occurs first.[215]

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[210] *Johnson v. Lucent Technologies, Inc.*, 653 F.3d 1000 (9th Cir. 2011)

[211] Govt. Code sec. 12960(d)

[212] Govt. Code sec. 12960(d)(1)

[213] Govt. Code sec. 12960(d)(2)

[214] Govt. Code sec. 12965 (d)(e)

The initial burden of proof is on the charging party; you are innocent until proven guilty. The DFEH can subpoena records, require deposition testimony, require response to interrogatories and otherwise engage in discovery of the facts.[216]

The DFEH may issue a right to sue letter and terminate its investigation if it finds no basis for the claim, or upon the complaining party's request. Complainants automatically receive an authorization to file suit if an investigation has not been completed 150 days after filing. The DFEH continues the investigation unless the complainant actually files suit.[217]

If the DFEH determines substantial evidence exists to support the charge, the DFEH will first attempt to remedy the matter by means of conference and conciliation.[218]

DFEH Can File Civil Action

The DFEH is authorized to file cases directly in court when the agency believes a complaint is valid and conciliation efforts have failed. If the DFEH chooses to file a civil action, it brings the action in the name of the DFEH and on behalf of the person claiming to be aggrieved. The aggrieved party has the right to participate in the civil action as a party and be represented by his/her own counsel. The DFEH is also authorized to collect attorneys fees and costs when it is the prevailing party in FEHA litigation.

Prior to filing a civil action, the DFEH has the authority to require all parties to participate in mandatory dispute resolution in the DFEH's Internal Dispute Resolution Division, free of charge to the parties, in an effort to resolve the dispute without litigation.

Dispute resolution will be mandatory for all claims for which the DFEH will file a civil action.

Although an employee must file a complaint with the DFEH to proceed with a suit under FEHA, the DFEH does not provide the exclusive remedy for employee challenges to alleged employment discrimination. For example, the California Constitution protects people from sex, race, color, religious and national origin discrimination. Employees who claim constitutional violations or tort claims can bypass the DFEH administrative processes and go directly to court to pursue common law claims that are related to employment discrimination but are not covered by FEHA. For example, an employee can bring claims for intentional infliction of emotional distress directly to court.[219]

Extension of Filing Deadlines

If an employee was subjected to violence or intimidation by threat of violence because of membership in a class that is protected by FEHA, the time limit for filing a complaint is extended for an additional year from the date that the employee becomes aware of the person who caused or threatened the violence. If the employee is unaware of the person's identity, the maximum time for filing a complaint is three years from the date of the unlawful event.[220]

A minor has up to one year from his/her 18th birthday to file a complaint.[221]

[illegible]

[illegible]

[illegible]

[illegible]

219. *Rojo v. Kliger*, 52 Cal. 3d 65 (1990)

220. Govt. Code sec. 12960(d)(3)

221. Govt. Code sec. 12960(d)(4)

Filing Deadlines Under FEHA Extended While Employee Pursues Internal Complaint Procedure

Employees who voluntarily use employer internal remedies before filing a complaint under FEHA do not risk missing the filing deadline with the DFEH. Employees who are claiming a rights violation under FEHA have one year from the alleged violation to file a complaint. However, if they use an employer internal remedy process and one year passes, they do not lose the opportunity to sue the employer.[222]

The law does not require that employees pursue mandatory or voluntary internal remedies before filing a suit or a claim under FEHA. Further, FEHA does not explicitly prohibit an employee from pursuing a DFEH claim after the internal process has been initiated or followed.

In *McDonald v. Antelope Valley Community College District*, the court ruled that the public policy of prompt resolution of claims is supported by encouraging employees to follow internal or alternative dispute resolution. However, their right to pursue a claim using the legal process should not be taken away because employees choose to pursue an internal remedy first.

Filing Deadlines for FEHA Extended Where There Is a Continuing Violation

According to the California Supreme Court, employees who sue for workplace harassment can recover for harassing acts that occurred more than one year before filing a lawsuit. Despite a one-year statute of limitations, if similar harassment continues over a number of years, an employee can recover for illegal actions that occurred more than a year before the lawsuit was filed.[223]

In reaching its decision in *Richards v. CH2M Hill, Inc.*, the California Supreme Court considered the disability discrimination and harassment claims of a civil engineer who developed multiple sclerosis. A jury awarded $1.4 million to the employee based on evidence that the employer, over a period of five years, ignored or refused most requests for reasonable accommodation. The Court of Appeal reversed the ruling, holding that the engineer was entitled to damages only for the illegal actions that took place during the one-year period before the lawsuit was filed.

The California Supreme Court disagreed, reasoning that the ongoing interactive process of determining reasonable accommodation and correcting incidents of harassment can be time-consuming. With a strict one-year time limit, an employee who continues to work with an employer to come to a mutually satisfactory solution, rather than immediately filing a lawsuit, risks losing the right to sue altogether.

Even if some actions occurred more than one year before the lawsuit was filed, the court held that an employee can recover for a series of unlawful actions if:

- The actions are sufficiently similar.
- The actions occur with sufficient frequency.
- The situation has not reached a stage where the employee knows or should know that further efforts at informal conciliation with the employer would not be successful. For example, if the employer makes it clear that it will not grant further requests for accommodation, the employee knows that working with the employer will not be successful.

Richards v. CH2M Hill, Inc. does not affect the time limits for filing a lawsuit based on a single incident, such as a termination or refusal to hire.

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[222] *McDonald v. Antelope Valley* [illegible]

[223] *Richard* [illegible]

FEHA and Independent Contractors

Under FEHA,[224] it is illegal to harass an independent contractor, defined as any "person providing services pursuant to a contract," on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age or sexual orientation. For more information, see "Independent Contractors and Sexual Harassment" in Chapter 27, page 787.

Although the law extends protection from harassment to independent contractors, it does not extend any legal protection from discrimination to independent contractors.

Claims Against Religious Organizations

A California Court of Appeal ruled that under the First Amendment, a religious organization is not subject to a civil lawsuit alleging discrimination under FEHA. In *Schmoll v. Chapman University*, a minister at a church-affiliated university alleged that her pay and hours were cut in retaliation for reporting student complaints of sexual harassment by faculty members. The court found that the First Amendment guarantees a religious institution's right to decide matters that affect its ministers' employment, free from the scrutiny and second guessing of the civil courts.[225]

Supervisors Not Personally Liable for Discrimination or Retaliation

The California Supreme Court ruled that supervisors are not personally liable for employment discrimination. In *Reno v. Baird*, an employee claimed that she was terminated because she had cancer. The employee sued her employer and her supervisor for discrimination based on the medical condition, as well as for wrongful termination under FEHA. The court refused to hold the supervisor individually liable, finding that FEHA, while imposing personal liability for harassment, was not intended to impose personal liability for discrimination.

The court explained that a fundamental difference exists between discrimination and harassment. Acts that might be labeled discriminatory are the very acts inherent to a supervisor's job, for example, hiring, promotions and terminations. On the other hand, harassment consists of a type of behavior that is not necessary for a supervisor's job. Although it is possible for a supervisor to avoid harassment, it is not possible to avoid making personnel decisions, nor to prevent the claim that those decisions were discriminatory.[226]

The California Supreme Court has held that, in addition to discrimination, a supervisor cannot be held personally liable for acts of retaliation against employees.[227] For more information, see "Employees Protected From Retaliation" on page 707.

Claims Filed Under the California Civil Code

A California Court of Appeal held that an employee who is subjected to violence and discrimination in the workplace could sue under specified Civil Code provisions commonly associated with the California Unruh Civil Rights Act (Unruh Act). The Unruh Act typically prohibits discrimination in housing and public accommodations.[228]

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[224] Govt. Code sec. 12940 (j)(1)

[225] *Schmoll v. Chapman University*, 70 Cal. App. 4th 1434 (1999)

[226] *Reno v. Baird*, 18 Cal. 4th 640 (1998); *Janken v. GM Hughes Electronics*, 46 Cal. App. 4th 55 (1996)

[227] *Jones v. The Lodge at Torrey Pines Partnership*, 42 Cal. 4th 1158 (2008)

[228] *Stamps v. Superior Court*, 136 Cal. App. 4th 1441 (2006)

In *Stamps v. Superior Court*, the court found that the Civil Code sections at issue were clearly not part of the Unruh Act. However, the Legislature intended the sections to respond to a perceived, growing threat of violence due to race. These Civil Code sections were intended to allow an individual to bring a civil action to stop and remedy acts of discriminatory violence and intimidation.

Because the court did not prohibit relief under these statutes, employees can seek additional damages if race discrimination claims include allegations of intimidation and discriminatory violence. These damages are separate from claims that an individual must file with the DFEH.

Investigation by Government Agencies

You may first become aware of a discrimination claim when you receive notice from the DFEH or the EEOC that a complaint was filed. The actions you take from that point forward can determine the success of your defense and the extent of your liability. Unless you are intimately familiar with discrimination statutes, regulations and case law in discrimination, seek knowledgeable legal counsel. For additional information on investigations, see "Conducting Appropriate Sexual Harassment Investigations" on page 811.

Guidelines for Responding to Discrimination Investigations

Follow these guidelines when preparing your response to a government agency conducting a discrimination investigation:

- When you are contacted in writing or in person by a state or federal agency, tell the agency that you will cooperate to the fullest extent of the law. Request time to consult with counsel before disclosing any information or documentation.
- Upon receiving a state or federal administrative charge of any kind, seek appropriate legal advice so you disclose only relevant documents and information that the law requires you to disclose.
- Educate and train front office personnel on how to handle state or federal agents who may come into the office with a subpoena. Ask your employees to notify you immediately before releasing any information.
- Ensure that written complaints are handled appropriately so that the time for responding does not pass without a response.

Scope of a Discrimination Investigation

Representatives of the EEOC and the DFEH may seek to expand their investigation beyond the scope of the actual complaint. Your unsuspecting response to a seemingly innocent question or request for information can turn a relatively small individual claim into a major class action. During an investigation, overzealous agency investigators may seek information that appears to go beyond the scope of matters alleged in the employee's complaint. Though you may not want to appear uncooperative, contact legal counsel for advice on how to respond. Providing more information than the investigation requires risks expansion of the charge and greater company liability.

In *EEOC v. Southern Farm Bureau Casualty Insurance Co.*, an employee filed a charge of race discrimination with the EEOC. The employee alleged that Southern Farm discriminated against him and other agents on the basis of race. After an investigation, the EEOC filed suit in federal district court and requested a list of claims agents by name, position and race. Nineteen months later, the EEOC discovered a pattern of sex-based discrimination in addition to race discrimination. The EEOC then requested data about the sex of various employees in various positions. When Southern Farm refused, the EEOC issued a subpoena. An appeals court upheld the lower court's decision refusing to enforce the subpoena, pointing out that the sex-based data had no relevance to the race claim. Information that the EEOC requests must be based on a valid charge filed by either an aggrieved individual or by the EEOC itself.[229]

Managing Company Response to a Discrimination Investigation

Be careful when drafting your responses to an investigation. The Ninth Circuit Court of Appeals decision underscored this fact in *Hernandez v. Hughes Missile Systems Company*. A former employee was denied application for re-employment. He tested positive for drugs and had an alcohol problem while employed. He was allowed to resign in lieu of termination. The former employee reapplied for his old job three years later, but was ineligible for rehire because of the company's policy that prohibited rehiring terminated employees. The court ruled that the rejection was unlawful and the policy invalid when applied to recovered drug or alcohol abusers. Recovered drug and alcohol abusers are protected by the ADA.

The representative who made the no-rehire decision testified that she knew only that the prior employment ended because of misconduct. However, a written position statement from the company to the EEOC stated that the applicant "was rejected based on his demonstrated drug use when previously employed and complete lack of evidence indicating successful rehabilitation." The court cited this conflict as one of the reasons that it decided the case should go to trial. The decision reinforces the importance of a carefully drafted position statement to the EEOC during a discrimination investigation.[230]

Penalties for Discrimination

The penalties for engaging in unlawful employment discrimination differ based on the violated law and the agency or court in which the penalty is assessed. All cases can have a substantial financial impact and lay the groundwork for similar claims by other employees.

Once you receive a complaint, consult with legal counsel to determine the best option for your company. Options include:

- A settlement to resolve a claim before a formal complaint is filed
- Mediation offered by DFEH or the EEOC after a complaint is filed

Remedies Under FEHA

If you are found to have engaged in an employment practice that is unlawful under the FEHA, you can be required to:

- Pay actual damages for injuries or losses that the complainant suffered, including loss of back pay and front pay for lost future wages where reinstatement is inappropriate
- Pay compensatory damages — for pain, suffering, humiliation and embarrassment
- Pay punitive damages
- Pay attorneys' fees
- Pay costs

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[229] *EEOC v. Southern Farm Bureau Casualty Insurance Co.*, 271 F.3d 209 (5th Cir

[230] *Hernandez v. Hughes Missile Systems Company*, 362 F.3d 564 (9th Cir. 2004

- Conduct training for all employees, supervisors and management on FEHA and your internal grievance procedures
- Pay expert witness fees to the prevailing party[231]
- Pay fines of up to $25,000 for perpetrators of hate crime violence

The DFEH may bring a civil action directly to court if the agency determines an employer has failed to eliminate an unlawful employment practice.

Liability Limited In Mixed Motive Cases

The California Supreme Court issued a significant ruling on the issue of liability in discrimination cases brought under the Fair Employment and Housing Act (FEHA).

The ruling addressed a scenario in which an employer terminates or takes some other type of adverse action against an employee for a legitimate business reason, such as poor performance, but there is also evidence that the employer engaged in discriminatory conduct against the employee. This is usually referred to as a "mixed motive" case: the employee presents evidence of unlawful discrimination; the employer presents evidence that it would have made the same decision anyway.

The court ruled that if an employer can prove that it would have made the same decision anyway, based on its lawful, non-discriminatory reason standing alone, the employee is not entitled to damages, back pay or reinstatement. This includes emotional distress damages. Other non-monetary relief and attorneys' fees may still be available to the employee.[232]

But an employer is not completely free of liability. Although an employer is allowed to make legitimate business decisions regarding such issues as employee performance and related discipline, the court noted that FEHA's clear intent is to prevent discrimination from occurring at work. If unlawful discrimination was also a substantial factor in the decision, the employee can be awarded declaratory relief (relief stating that the employer engaged in an unlawful practice), injunctive relief (an order stopping further conduct) and, when appropriate, reasonable attorneys' fees and costs.

Compensatory and Punitive Damages Under Title VII

The federal Civil Rights Act of 1991 expanded the right of plaintiffs to compensatory and punitive damages. It allows those who claim intentional discrimination or harassment based on sex, race, religion, national origin or color under Title VII, or disability under the ADA or Rehabilitation Act, to obtain compensatory and punitive damages. The damages are measured by the size of the employer's workforce, up to a maximum of $300,000.

The following table shows compensatory and punitive damages:[233]

Number of Employees	Damages Limitation
1 - 14	No damages recoverable (employers of fewer than 15 employees are not covered by these acts, but are covered by FEHA)
15 - 100	$50,000
101 - 200	$100,000
201 - 500	$200,000

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[231] Govt. Code sec. 12965

[232] *Harris v. City of Santa Monica*, 56 Cal.4th 203 (2013)

[233] Civil Rights Act sec. 102

Number of Employees	Damages Limitation
500+	$300,000

Compensatory or punitive damages are allowed under the Civil Rights Act only when you engage in intentional "disparate treatment" discrimination. Where "disparate impact" discrimination is found, punitive and compensatory damages are not allowed.[234] For more information on disparate treatment and disparate impact, see "Discrimination Defined" on page 701.

In addition, plaintiffs who sue under these statutes for compensatory or punitive damages have the right to jury trials. Courts cannot inform juries about the legal limits on punitive and compensatory damage awards.

Front Pay Unlimited Under Title VII

The U.S. Supreme Court created the possibility of unlimited awards in employment discrimination lawsuits in federal court, despite the $300,000 cap on damages in Title VII. The Court ruled that the cap does not apply to front pay — money an employee would have continued earning if he/she was not illegally terminated.[235]

Punitive Damages Under Title VII

In *Kolstad v. American Dental Association*, the U.S. Supreme Court defined the circumstances under which punitive damages can be awarded against employers for unlawful intentional discrimination under Title VII.[236] An employee claimed that she was passed over for promotion due to intentional discrimination based on her sex. The lower courts found that intentional discrimination occurred. They granted the employee back wages, but did not award punitive damages against the employer.

The U.S. Supreme Court held that an employer may not be held liable for punitive damages for the discriminatory supervisorial employees' employment decisions if those decisions are contrary to the employer's good-faith efforts to prevent discrimination. You might demonstrate good-faith efforts by implementing employer and employee anti-discrimination education programs, instituting an open-door policy for employees to report discrimination, and conducting effective discrimination investigations.

Limits on Punitive Damages in Discrimination Lawsuits

The U.S. Supreme Court limited a jury's ability to grant unreasonable punitive damage awards. The Court ordered recalculation of a punitive damage award consistent with due process rights under the 14th Amendment.

In a case for bad faith, fraud and intentional infliction of emotional distress involving an auto accident, the U.S. Supreme Court said that where $1 million compensatory damages are awarded, punitive damages of $145 million are excessive. The 14th Amendment of the U.S. Constitution prohibits imposing grossly excessive or arbitrary punishments.[237]

In *Roby v. McKesson Corp.*, the California Supreme Court addressed limits on punitive damages awards in discrimination cases. An employee was harassed, discriminated against and wrongfully terminated based on her medical condition and related disability. In the original trial, the jury found in favor of the plaintiff. The jury awarded her substantial compensatory damages and punitive damages of $15 million against both her employer and the supervisor who harassed her.

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[234] Civil Rights Act sec. 102

[235] *Pollard v. E.I. duPont Nemours & Co.*, 532 U.S. 843 (2001)

[236] *Kolstad v. American Dental Association*, 527 U.S. 526 (1999)

[237] *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003)

The California Supreme Court struck down most of the punitive awards. The due process clause of the 14th Amendment of the U.S. Constitution limits state court punitive awards. According to the court, the rationale for this limit is that someone who commits a wrong must have fair notice "not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." In this case, the California Supreme Court took into account the low level of culpability on the employer's part and found that, given the facts of the case, the punitive damages could be no greater than the compensatory damages, that is a 1:1 ratio.[238]

What saved the employer in this case is that most of the blame rested with the supervisor, and the corporation's culpable conduct was "relatively low." This one-to-one ratio may not be applied in other circumstances. Unlike the supervisor, the corporation itself did not engage in repeated misconduct. The court explained that there was no evidence that the supervisor's "actions toward Roby were the product of a corporate culture that encouraged similar supervisory conduct. Rather, they appear to be the isolated actions of a single supervisor, combined with the one time failure on the part of the employer ... to take prompt responsive action when these events came to its attention."

Remember to take any claims of harassment and/or discrimination seriously. Investigate an employee's need for family and medical leave.

Defense Against Claims of Discrimination

Under the state or federal anti-discrimination laws, employment discrimination can be lawful if you can show both a proper, relevant affirmative defense and that less discriminatory alternatives are not available. Except where otherwise noted, one or more of the following affirmative defenses may be appropriate in a situation to justify the employment practice in question.

Bona Fide Occupational Qualification (BFOQ) as a Discrimination Defense

Discrimination based on religion, sex or national origin is not illegal if you can prove that "religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the business enterprise."[239] Similarly, it is not unlawful under the ADEA (age discrimination) to take action based on a BFOQ.[240]

To establish a BFOQ defense, you must prove:

- A relationship between the characteristic and job performance
- The necessity of the characteristic for successful performance
- That the job performance in question is essential to your business operation

BFOQ is usually asserted in regards to an employee's sex. The courts very narrowly construe BFOQs.

If you maintain a business practice that excludes an entire group of protected individuals (for example, all women or all individuals with lower back defects), you must prove that the business practice is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question, or because the essential business operation would otherwise be undermined.

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[238] *Roby v. McKesson Corp.*, 47 Cal. 4th 686 (2009)

[239] Title VII of the Civil Rights Act of 1964 sec. 703(e)(1)

[240] 29 U.S.C. sec. 623(f)

Before you attempt to use a BFOQ as a defense, consult legal counsel.

For more information on BFOQs, see “Bona Fide Occupational Qualifications in Hiring” in Chapter 3, page 25.

Business Necessity as a Discrimination Defense

If you maintain a practice that appears to be neutral, but creates an adverse impact on protected classes, you must prove that there is an overriding legitimate business purpose. For example, you may argue that the practice is necessary to the safe and efficient operation of the business. You must also prove that the challenged practice effectively fulfills the business purpose it is designed to serve. A practice may not be permissible if an alternative practice would accomplish the business purpose equally well with a less discriminatory impact.[241]

Job-Relatedness as a Discrimination Defense

Any selection criterion or qualification must be a valid predictor of the applicant’s success at performing the job in question.[242] For example, typing and spelling tests are related to a secretary’s job. However, requiring a driver’s license or high school diploma for a labor job would be difficult to justify.

‘Reasonable Factor Other than Age’ as an Age Discrimination Defense

Under the ADEA, a specific defense known as the “Reasonable Factor Other than Age” (RFOA) defense is available for disparate impact claims: claims that policies which are neutral on their face have a substantially greater impact on older workers than younger workers. For instance, the RFOA defense would apply to neutral tests, such as physical fitness tests, that are used to screen employees if those tests had a disparate impact on older workers versus younger workers.

The defense is not available when an employment practice is not neutral, and specifically uses age as a limiting criterion (for instance, a company practice that states that the company will not hire anyone over 45 years old). The defense is also not available in disparate treatment cases, where an employee claims he/she was singled out for different treatment (such as discipline) because of his/her age. For a discussion of the difference between disparate treatment and disparate impact cases, see “Discrimination Defined” on page 701.

A “reasonable factor other than age” is “a non-age factor that is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances.” The regulation emphasizes the need for a case-by case analysis of “all the particular facts and circumstances surrounding each individual situation.” Further, “to establish the RFOA defense, an employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer.”[243]

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[241] *Griggs v. Duke Power Company*, 401 U.S. 424 (1971)

[242] *Griggs v. Duke Power Company*, 401 U.S. 424 (1971)

[243] 29 CFR sec. 1625.7(e)

The EEOC provided the following example:

- A police department requires applicants for patrol positions to pass a physical fitness test to assure that officers can physically pursue and apprehend suspects. The department should know that such a test may exclude older workers over younger workers. Nevertheless, the department's actions are likely based on an RFOA if the department reasonably believed that the test measured the speed and strength necessary for the job and if it did not know (or should not have known) of steps to take to reduce harm to older workers without unduly burdening the department.

There are several considerations which a court will take into account to assess the reasonableness of the employer's actions and the availability of the defense.[244]

Employers that have practices which potentially impact older workers more than younger workers, such as screening tests or reductions in force, should consult legal counsel. Employers should never assume that the RFOA defense will be available to them. Employers should clearly identify business goals and needs when implementing policies or practices that may have a disparate impact. Managers should also be trained to recognize practices that may have a disparate impact and also to make objective decisions.

Security Regulations as a Discrimination Defense

Without a showing of discrimination, an employment practice that conforms to applicable security regulations that have been established by the United States or the State of California is lawful.

Nondiscrimination or Affirmative Action Plans as a Discrimination Defense

Absent a showing of discrimination, such an employment practice is lawful which conforms to:

- A bona fide affirmative action plan (although some plans may be limited in California)
- A nondiscrimination plan pursuant to Labor Code section 1431[245]
- An order of a state or federal court or administrative agency of proper jurisdiction

For more information on affirmative action see "Affirmative Action" on page 776.

The "Same-Actor Inference" Defense

The Ninth Circuit Court of Appeals applies what it refers to as the "same-actor inference." This means that when hiring and firing or promoting and firing occurs within a relatively short time and involves the same decision-maker, the court will infer that no discrimination occurred. Employers will still be expected to prove a nondiscriminatory reason for the decision to discharge.[246]

Otherwise Required by Law as a Discrimination Defense

Unless discrimination is shown, an employment practice is lawful if it is required by state or federal law, or if it is pursuant to an order of a state or federal court of proper jurisdiction.[247]

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[244] 29 CFR sec. 1625.7(e)

[245] *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987)

[246] *Coghlan v. American Seafoods Co.*, 413 F.3d 1090 (9th Cir. 2005)

[247] 2 CCR sec. 11010

After you present a legitimate nondiscriminatory reason for your decision, the employee must prove that the reason you gave is a pretext for unlawful discrimination.[248]

Avoiding Discrimination Claims

Some acts and omissions by supervisors can appear to be unlawful discrimination even though you can prove that they were not. Any act that appears to be unfair may initially be viewed as discrimination if it happens to a member of a protected class. Any decision that is based on subjective feelings about people, rather than on objective facts can look like discrimination. Any negative decision that is made without a full, fair investigation can also appear to be discriminatory. The best way to prevent discrimination or the appearance of discrimination is to always follow these basic rules when making decisions about employees:

- **Apply all rules and standards equally.** Treating all employees equally seldom results in claims of unlawful discrimination.
- **Provide consistent signals and candid appraisals.** The most difficult employment discrimination case to defend is a discharge for unsatisfactory performance shortly after a "merit" increase that was intended to motivate substandard performance. Mixed signals create discrimination charges.
- **Do not delay decisions.** If you do not act upon problems immediately, you may create a sense that you have accepted or condoned a bad situation. Delaying a decision can enhance the appearance of unfairness. If you delay addressing a bad situation, problems can worsen. The delay may result in more severe disciplinary action than if the situation had been addressed immediately.
- **Assume that everyone wants to advance within the organization.** Supervisors may assume that certain employees have no interest in advancement or in better salaries because of attitudes that the employees appear to display, or by making assumptions about an employee's family obligations. These are bad assumptions. Consider all employees for advancement. Make choices on the basis of the best qualifications. Do not overlook anyone because he/she "appears" uninterested in promotion.
- **Provide clear instructions and warnings.** Do not ever think that employees "should have known" what was expected. Tell everyone clearly what is expected. To hold employees to certain rules of conduct, you must make those rules clear.
- **Always hear an employee's side before taking action against him/her.** This is the fundamental constitutional idea of "due process" on a small scale. A supervisor can take action against an employee, but should not do so until all the facts are in and a full investigation has been conducted.
- **Avoid making decisions on the basis of subjective feelings about people. Rely on objective facts.** A person's performance in a current job is usually a good predictor of success in an upgraded job, especially if you have assigned some upgraded tasks to see how the person responds to the additional responsibilities. Subjective feelings about a person's abilities are neither dependable nor explainable if a discrimination charge results from that decision.
- **Explain decisions to affected employees.** Many discrimination cases are filed because adverse action was taken against an employee and no one explained why it happened. For example, although a very detailed explanation is not always in order, an employee who knows he/she is being considered for a promotion but is not selected should receive some explanation for the decision.

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[248] *Mixon v. FEHC*, 192 Cal. App. 3d 1306 (1987)

- **Keep communication channels open.** Hold frequent conversations and meetings at regular intervals. An environment in which supervisors only talk and employees only listen is bad. Communication must flow up as well as down.
- **Maintain complete and accurate records and documentation of all incidents.** Documentation includes witness testimony, your response, charges that the complainant files and other information. Date and sign all documents.

Equal Employment Opportunity Sample Policy

Equal Employment Opportunity Sample Policy - Spanish

Anti-Harassment Sample Policy

Anti-Harassment Sample Policy - Spanish

Consensual Relationship Agreement

Manager's Checklist to Avoid Discrimination

Discrimination Reporting Requirements

Many laws impose reporting duties on employers of 100 or more employees or on employers with federal and state government contracts. Failure to file required reports can lead to penalties and loss of contract opportunities.

EEO Reporting

The federal Equal Employment Opportunity Commission (EEOC) collects workforce data from certain employers, depending on employer size, federal contracts and other threshold requirements. The reports collect data about gender, race and ethnicity. Although the data is confidential, aggregated data is available to the public.

Who Must File the EEO-1

You must file *Standard Form 100 (EEO-1)* if you:

- Are a private employer covered by Title VII of the Civil Rights Act of 1964 (as amended by the Equal Employment Opportunity Act of 1972) with 100 or more employees, excluding:
  - A primary or secondary school system
  - An institution of higher education
  - A Native American tribe
  - A tax-exempt private membership club other than a labor organization
- Have fewer than 100 employees and your company is owned or affiliated with another company, or there is centralized ownership, control or management (such as central control over personnel policies and labor relations) so that the group legally constitutes a single enterprise, and the entire enterprise employs a total of 100 or more employees
- Are a federal contractor (private employer) who has 50 or more employees and you meet one or more of the following criteria:
  - You are a prime contractor or first-tier subcontractor and have a contract, subcontract or purchase order amounting to $50,000 or more.

- You serve as a depository of government funds in any amount.
- You are a financial institution that is an issuing and paying agent for U.S. Savings Bonds.

EEO-1 Reporting

All single-establishment employers with 100 or more employees — those doing business at only one establishment in one location — must complete a single EEO-1 form. You can use one of the alternate filing methods.

All multi-establishment employers — those doing business at more than one establishment — must file the following:

- A report that covers the principal or headquarters office
- A separate report for each establishment that employs 50 or more people
- A consolidated report that must include all employees by race, sex and job category in all establishments
- A list that shows the name, address, total employment and major activity for each establishment that employs fewer than 50 people

The total number of employees indicated on the headquarters report, plus the establishment reports, plus the list of establishments with fewer than 50 employees, must equal the total number of employees shown on the consolidated report. All forms for a multi-establishment company must be collected by the headquarters office for its establishments or by the parent corporation for its subsidiary holdings and submitted in one package.

For the purposes of the EEO-1 report, the term "parent corporation" refers to any corporation that owns all or the majority stock of another corporation so that the latter stands as a subsidiary in relation to the parent corporation.

You must file the *Employer Information Report EEO-1* annually on September 30. The Web-based filing system at www.eeoc.gov/eeo1survey provides you with up to 10 years of your company's historical EEO-1 reporting information. No software needs to be installed because the form and instructions are completely online. If you filed an EEO-1 form in previous years, you should find that some information on the form is filled in from the previous year. This system uses encrypted files for data transfer to ensure data privacy.

Each company has a unique identification number. Each establishment has a unique unit number. The company number and unit number are used together to identify an establishment within a company.

If you are a first-time filer, the EEOC's website includes a registration form. The EEOC will issue a company number. You can log into the system to fill out the EEO-1 form.

You can use employment figures from any pay period in the third quarter, July through September. Employers who have been granted permission to use year-end employment figures in the past can do so.

All companies should receive EEO-1 filing materials by mail no later than mid August of the filing year. For example, you should receive the 2016 filing materials by mail no later than mid-August 2016. To request an extension for filing, contact the EEO-1 Joint Reporting Committee at e1.extensions@eeoc.gov before September 30. Include your company name, company number, address and the contact information for the person who is responsible for the report.

Employers must attempt to allow employees to use self-identification to complete the EEO-1 report. The EEOC does not have any general requirement that permanent records of employee self-identification be kept. If voluntary self-identification forms are kept, they should be kept separate from all other personnel records or other records available to those responsible for personnel decisions (e.g., as part of an automatic data processing system in the payroll department).

Most questions can be answered by visiting the EEOC website (at www.eeoc.gov) or by contacting the EEOC at:

EEOC - Surveys Division
131 M Street, NE - Room 4SW22G
Washington, D.C. 20507
Phone: 1-877-392-4647 or 1-866-286-6440
Fax: 202-663-7185
email: e1.techassistance@eeoc.gov

Other Reporting Requirements

Other EEO Reporting Requirements

In addition to the EEO-1 requirements, there are three additional types of reports currently in use:

- EEO-3: Local Union Report
- EEO-4: State and Local Government Report
- EEO-5: Elementary-Secondary Staff Information Report

For more information on these reporting requirements, including who must file and filing deadlines, use the *EEO Reporting Requirements* chart.

EEO Reporting Requirements

Affirmative Action Reporting

Every federal contractor and subcontractor must agree not to discriminate against any employee or applicant because of race, color, religion, sex, sexual orientation, gender identity, or national origin. Federal contractors and subcontractors must take affirmative action to ensure that all applicants and employees are employed without regard to those factors.

Contractors and subcontractors with 50 or more employees and a contract or subcontract of $50,000 or more and banks that receive deposits of any type of federal funds must develop written affirmative action plans. Affirmative action plans must contain all of the following:

- An analysis of the contractor's workforce by race and sex
- An analysis of the labor force by race and sex
- A determination of whether the contractor is underemploying minorities or women in any job categories

The Office of Federal Contract Compliance Programs (OFCCP) enforces the obligations of federal contractors and subcontractors. Allegations of violations may result in an OFCCP audit of your employment practices. If substantial evidence is found that supports the employee's charge, formal adjudication will happen before the OFCCP, the EEOC or the U.S. Department of Justice (DOJ).

A finding that a contractor or subcontractor violated the federal requirements can result in an OFCCP order that, among other things, may result in cancellation, termination or suspension of the contractor's or subcontractor's government contract(s) and/or being barred from holding government contracts in the future. Compliance with federal contract rules can be complex. A contractors' guide is available from the DOL. Helpful information is also available from the Office of Federal Contract Compliance Programs (OFCCP).

Veterans Reporting

The Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) prohibits covered federal contractors and subcontractors from employment discrimination against protected veterans and requires these employers to take affirmative action to recruit, hire, promote and retain these veterans.

The VEVRAA regulations establish a hiring "benchmark" for protected veterans each year.

The VEVRAA regulations apply to federal contractors and subcontractors with a contract of $100,000 or more. The affirmative action plan requirements, including the creation of affirmative action plans and solicitation of veteran information discussed below, apply to contractors and subcontractors with a contract of $100,000 *and* 50 or more employees.

The VEVRAA regulations require covered federal contractors to invite applicants for employment to self-identify as protected veterans at both the pre-offer and post-offer stage. The Final Rule includes sample invitations to self-identify that contractors can use to meet this requirement.

Contractors who develop their own self-identification forms must make certain to include certain required statements, including:

- That the information being requested is voluntary
- The information will be kept confidential
- That refusal to provide information will not result in any adverse treatment

The Final Rule requires that contractors annually document and update several quantitative comparisons for the number of veterans who apply for jobs and the number of veterans they hire. This data is intended to assist contractors in measuring the effectiveness of their outreach and recruitment efforts. The data must be maintained for three years to be used so the OFCCP can spot trends.

For more information on this Final Rule, the OFCCP has a fact page available and also has answers to frequently asked questions.

VETS Forms

In accordance with Title 38, United States Code, Section 4212(d), the U.S. DOL, Veterans' Employment and Training Service (VETS) collects and compiles data on the employment of veterans with federal contractors and subcontractors.

In the past, federal contractors were required to submit one of two reports, the VETS-100 or the VETS-100A. In some cases, you were required to submit two reports.

Beginning in 2015, the *VETS-100* form is obsolete and a new form, the *VETS-4212 Report*, replaces the *Vets-100A*.

VETS-4212

Contractors and subcontractors with federal contracts of $100,000 or more must file the *VETS-4212*.

Federal contractors receive a *VETS-4212* form with filing instructions in July of each year. Reports must be filed between August 1, and September 30. The report is required on an annual basis. You can submit the information using one of the following methods:

- Filing on the DOL website, www.dol.gov
- Submitting an electronic data file
- Uploading a file from your computer
- Submitting the report in hard-copy format

For more information, see the DOL website at http://www.dol.gov/vets/.

Individuals With Disabilities

Section 503 prohibits covered federal contractors and subcontractors from discriminating in employment against individuals with disabilities (IWDs), and covered contractors must take affirmative action to recruit, hire, promote, and retain them. The Final Rule, implemented in 2013, strengthens the affirmative action provisions of the regulations to aid contractors in their efforts to recruit and hire IWDs.

The Final Rule also makes changes to the nondiscrimination provisions of the regulations to bring them into compliance with the ADA Amendments Act of 2008. The Final Rule establishes a seven percent utilization goal for individuals with disabilities. For more information on this Final Rule the OFCCP has a fact page available. The OFCCP also has answers to frequently asked questions.

Covered Contractors

The general non-discrimination and affirmative action requirements of section 503 apply to federal contractors and covered subcontractors with a contract of $10,000 or more. The affirmative action plan requirements, including the creation of affirmative action plans and solicitation of disability information discussed below, apply to contractors and subcontractors with a contract of $50,000 or more and 50 or more employees.

Recording and Reporting

The Final Rule requires that contractors annually document and update several quantitative comparisons for the number of IWDs who apply for jobs and the number of IWDs they hire. The collection of this data is intended to assist contractors in measuring the effectiveness of their outreach and recruitment efforts. The data must be maintained for three years so the OFCCP can spot trends.

The Final Rule also has new voluntary self-identification procedures requiring covered contractors to invite applicants to self-identify as IWDs at both the pre-offer and post-offer phases of the application process, using language prescribed by OFCCP. The Final Rule also requires that contractors invite their employees to self-identify as IWDs every five years, using the prescribed language. The contractors must implement specific processes when soliciting this type of information.

The OFCCP has created a *Voluntary Self Identification of Disability* form that covered contractors must use to invite applicants to self-identify. There are strict rules. Unlike the VEVRAA rules which provide only sample forms, this is a mandatory form that must be used by covered contractors.

Required State Contractor Reporting Forms

In addition, if you contract with California state government for public works, goods and services, you must prepare a nondiscrimination program pursuant to DFEH regulations.[249] The DFEH's Office of

Compliance reviews and monitors state contractors' nondiscrimination programs, and issues regulations concerning the required contents of these programs.[250]

Affirmative Action

Affirmative action requires you to take positive steps to identify discrimination based on protected class status and to improve work opportunities for women, racial and ethnic minorities and people who belong to other protected groups that have been deprived of job opportunities.

Affirmative action involves making a specific effort to recruit individuals on the basis of membership in protected classes. Affirmative action also involves taking positive actions to ensure that individuals, when employed, have an equal opportunity for benefits and promotions. Affirmative action involves determining areas of workforce under-representation, locating qualified protected class candidates by enlarging the recruiting base and developing the skills they need to succeed in those new positions.

The following information discusses affirmative action requirements that were enacted before the effective date of Proposition 209 for state contractors and subcontractors. The Office of Compliance Programs (OCP) continues to enforce these requirements.

State Affirmative Action Programs and Proposition 209

California voters approved Proposition 209 in November 1996. Proposition 209 barred state and local governments — but not the federal government — from granting preferential treatment to any individual or group on the basis of race, sex, ethnicity or national origin in the operation of government hiring, contracting and education. Despite Proposition 209, many affirmative action programs remain in effect pending court challenges to Proposition 209.

Immediately after Proposition 209 passed, multiple lawsuits were filed to overturn it. A federal appeals court refused to block the measure from taking effect on August 28, 1997. The U.S. Supreme Court upheld that ruling. However, a number of state laws that mandate affirmative action programs remain on the books. These laws must be repealed or overturned by the courts for Proposition 209 to take full effect. State and local governments must also sort out the legal conflict between Proposition 209 and federal affirmative action mandates.

In *Connerly v. State Personnel Bd.*, a California Court of Appeal struck down five affirmative action laws that were related to the state government and community colleges. The affirmative action laws, administered by the state community college system and the State Personnel Board, set racial and gender preferences. The court let stand some provisions for gathering data on hiring women and minorities in state government.[251]

Proposition 209 is a state measure. It does not affect federal affirmative action programs. If you have federal contracts that are covered by affirmative action requirements, you must comply with those requirements.

Proposition 209 eliminated the requirement that employers who enter into contracts with state or local governments, or subcontractors hired by state or local governments, must maintain affirmative action programs. However, because some state and local affirmative action programs may not yet have been repealed, consult legal counsel. Affirmative action obligations can be imposed as part of a court-approved consent agreement or as part of a court order following the finding of employment discrimination in a class action lawsuit.

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249. Govt. Code sec. 12990

250. 2 CCR sec. 11099 et seq.

251. *Connerly v. State Personnel Bd.*, 92 Cal. App. 4th 16 (2001)

Affirmative Action and Federal Contractors and Subcontractors

Federal contractors and subcontractors are prohibited from discriminating against any employee or applicant based on race, color, religion, sex or national origin. These employers must also take affirmative efforts in employment and promotions so that minorities and women are employed at all levels of the workforce.[252]

In 2015, a final rule published by the Office of Federal Contract Compliance Programs (OFCCP) added sexual orientation and gender identity to the list of protected categories.

Under the federal guidelines, all contractors and subcontractors with 50 or more employees and a government contract or subcontract of $50,000 or more must develop a written affirmative action plan. The plan also is required of federal contractors and subcontractors who meet the following criteria:

- Have contracts totaling $50,000 or more in any 12-month period
- Serve as a depository of government funds in any amount
- Function as a financial institution that is the issuing and paying agent for U.S. Savings Bonds and savings notes in any amount

The affirmative action plan must include, among other things, an analysis of the contractor's workforce and the labor force by race and sex, a determination of whether the contractor is underemploying minorities or women in any job groups and the establishment of goals and timetables for correcting any underemployment.[253]

The OFCCP enforces the obligations of federal contractors and subcontractors. Alleged equal employment opportunity or affirmative action violations are investigated, settled and, in some cases, judged by formal administrative procedures before the OFCCP. If the OFCCP finds that a federal contractor or subcontractor violated its affirmative action obligations, it may seek relief for the particular individual(s) affected, including back pay and reinstatement. The OFCCP can order, among other things, that the contractor or subcontractor be barred from any future federal contracts until it is determined to be in compliance.[254]

For information on affirmative action reporting requirements, see "Affirmative Action Reporting" on page 773.

Affirmative Action and State Contractors and Subcontractors

Despite Proposition 209, if you contract with California state government for public works, goods or services in any amount, you must prepare a nondiscrimination program. A nondiscrimination program can include an affirmative action component. You must include an analysis of your workforce by job, race and sex, as well as an outline of your equal employment efforts in the program.[255] The state nondiscrimination program differs from the federal affirmative action plan in that you need not include hiring goals or timetables.

The DFEH issued regulations detailing the requirements of state-mandated nondiscrimination programs. The OCP, a branch of the DFEH, reviews and monitors state contractors' discrimination programs. The OCP can establish and maintain a list of barred contractors. It updates the list monthly and places it in the *California Notice Registry*, which is published each month. No contractor, during the performance of any contract with the state, can enter into any subcontract with any employer that is on the OCP list of barred contractors. To do so may constitute a material breach of the state contract.

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[252] Section 503 of the Rehabilitation Act of 1973

[253] 41 CFR Parts 60-1, 60-2

[254] 41 CFR Parts 60-1, 60-2

[255] 2 CCR sec. 11099 et seq.

Under state regulations, if you work on a state contract you must do the following under your nondiscrimination program:

- Develop your equal employment opportunity policy that covers all personnel actions or affirm that your policy does so.
- Formally disseminate your policy internally and externally. Inform all employees and applicants of that policy.
- Establish personnel policies to implement the program.
- Annually identify all existing practices that resulted in disproportionately inhibiting the employment, promotion or retention of those protected by the plan.
- Develop and execute programs that are designed to correct problems that prevent equal employment opportunities for all applicants and employees.
- Design and implement an internal audit and reporting system to measure the entire program's effectiveness.

If you receive state service or supply contracts in excess of $25,000, you must file a *Form DFEH-OCP-002 - California Employment Identification Report*. You can obtain this form at:

Department of Fair Employment and Housing
Office of Compliance Programs
2218 Kausen Drive, Suite 100
Elk Grove, CA 95758
(800) 884-1684

Voluntary Affirmative Action Plans

In the past 20 years, many employers developed affirmative action plans to increase hiring women and minorities in their workforce, even though federal, state or local law did not require them to do so. The U.S. Supreme Court upheld the validity of affirmative action plans under certain criteria for plans addressing past racial balance[256] and sexual discrimination.[257] In both of those cases, the Court concluded that the plan was lawful because it:

- Was meant to correct imbalances against protected classes and traditionally segregated job categories
- Did not result in the discharge or exclusion of white employees who were not members of a protected class
- Did not create an absolute bar to the advancement of unprotected class employees
- Was temporary and designed to eliminate a manifest imbalance against protected classes

Preparing an Affirmative Action Program

This section explains the basic contents of an adequate affirmative action plan.

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[256] *United Steelworkers v. Weber*, 443 U.S. 193 (1979)

[257] *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987)

Create an Equal Employment Opportunity Statement

As a contractor, you must indicate a positive attitude toward equal employment opportunity. You must state that decisions about recruitment, hiring, training and promotions will be made without regard to race, color, religion, sex, national origin or any other protected class status, except when one of those criteria is a BFOQ. The policy should be signed, dated, reaffirmed annually and distributed to employees and recruitment sources.

Appoint an EEO Officer

You must select a responsible executive as your affirmative action program director. It is the director's responsibility to assist in identifying solutions to problems. Give the director the necessary top management support and staffing to fulfill the job's duties. Include the director's name on all communications about the affirmative action plan.

Establish Procedures for Disseminating Policy

An affirmative action policy is of little value unless you go beyond the words on a piece of paper and put the plan into action. You must establish procedures for disseminating your affirmative action program, both inside and outside the facility. Document dissemination methods.

Perform Self-Analysis

You must identify the areas in your workforce in which minorities and women and other protected classes are underemployed. The employment analysis is composed of four parts:

- A workforce analysis (identification of the concentration or underutilization of protected individuals in certain job categories)
- Identification of job groups within the facility
- An availability analysis (information on the number of women and other protected classes available to fill each job category)
- An underutilization analysis (a comparison of personnel available with current workforce utilization)

You must identify key job titles in which women and other protected classes are underrepresented in relation to their availability in the workforce. Focus on those employment practices that discourage the employment or full employment of the protected group. Studies of applicant flow, recruitment procedures, selection and placement procedures, promotion and transfers, seniority systems, terminations, employee benefits and working conditions are necessary.

Take Corrective Action

For each job group in which you discover underemployment of protected classes, you must develop a system of goals and timetables for correcting the deficiencies. Establish separate goals for the disabled and minorities. You can establish a single goal for protected classes unless you determine that one protected class is underemployed in a substantially disparate manner. You can also create separate goals for disabled people and Vietnam veterans.

Set Up a Self-Monitoring System

You must set up a monitoring system to determine if the affirmative action program works or, if it does not, why not. A self-monitoring system might include periodic conferences with line supervisors, periodic audits to ensure that all job locations comply with the affirmative action policy and a formal updating program.

Take Further Corrective Action

Although a self-audit might indicate that the plan is being implemented in good faith, any indication that you are not attaining the objectives requires further corrective action.

Establish a Record Keeping System

During any stage of a compliance review, or in subsequent stages, you may be asked to supply the compliance officer with records, such as applicant flow data, hiring records, testing results, wage and job information, upward mobility action record, and records of terminations and demotions. Establish a system to compile this information for use as necessary.

Take Additional Steps

You might also consider the following affirmative-action steps designed to make your affirmative action program more effective:

- Enlist program participation or support by local or national community action programs, such as the National Alliance of Business, the Urban League, United Way agencies or other community projects. Outreach programs could include scholarships that are offered in conjunction with local or national community action programs.
- Require notification to all labor unions and subcontractors of their responsibilities under EEO requirements. Secure their acknowledgment and certification of compliance with those requirements.
- Encourage minority and female participation in company-sponsored social and recreational activities.

Further Information

For further information on discrimination laws, contact either of the following organizations:

Equal Employment Opportunity Commission
350 The Embarcadero, Suite 500
San Francisco, CA 94105-1260
(800) 669-4000

Department of Fair Employment and Housing
2218 Kausen Drive, Suite 100
Elk Grove, CA 95758
(800) 884-1684 or (916) 478-7251

If you are faced with a state discrimination charge, visit the DFEH website at http://www.dfeh.ca.gov/Complaints.htm.

EEOC Threshold Issues

The "Threshold Issues" section of the EEOC *Compliance Manual* is a helpful resource for employers who must defend themselves against discrimination charges. An individual must satisfy these "threshold issues" to have a legal claim under the equal employment statutes. The section is available online at http://www.eeoc.gov/laws/guidance/compliance.cfm. The section also contains numerous cross-references to more detailed discussions of particular issues.

When a charge is filed with the EEOC, the investigator determines if threshold requirements are satisfied before considering the actual claim of discrimination. Some threshold issues include:

- Was the charge filed within the legal time limits?
- Is the person filing the charge an employee? An independent contractor?
- Is the employer against whom the charge was filed exempt from the law?

Chapter 27

Harassment

Sexual harassment remains a serious area of concern for employers. Sexual harassment lawsuits spur record settlements and damage awards to victims. Employers bear liability for harassing acts that supervisors and employees commit.

Sexual harassment is not the only type of unlawful harassment prohibited in the workplace. It is illegal to harass an employee based on the employee's race, national origin, religion or any other protected characteristic.

This chapter explains the behaviors that constitute sexual harassment and the laws that prohibit harassment in the workplace. You will learn under which circumstances your company will be held liable for the acts of your employees, supervisors, managers and even non-employees. You will find how some individuals can be held personally liable for their acts in addition to making the company liable. This chapter also discusses procedural aspects of harassment claims and what you should do when you learn, directly or indirectly, that an employee is being harassed.

This chapter also includes information on the California law that mandates sexual harassment training for all supervisory positions.

Sexual Harassment Defined

Sexual harassment is prohibited under both state and federal law. The differences between state and federal law may be important if your business is faced with a lawsuit because there are some important differences in terms of liability. However, the aim is to avoid any conduct that could create potential liability in the first place.

Sexual harassment can include such conduct as asking for sexual favors, sexual touching, or offensive language. Not all sexual conduct in the workplace is illegal "sexual harassment." Generally, the conduct must be so frequent or severe that it creates a hostile or offensive work environment or results in an adverse employment decision (such as a firing).

Sexual harassment can include conduct showing hostile treatment toward someone based on that person's gender. Sexually harassing conduct does not need to be motivated by sexual desire.

However, the line between legal and illegal conduct is often very fine, and both state and federal law offer powerful protections to employees.

Employers should focus on prohibiting all potentially harassing conduct and not worry about whether the conduct rises to the level of illegal harassment. If conduct has crossed the legal line, it is too late.

The Equal Employment Opportunity Commission (EEOC) enforces federal prohibitions against sexual harassment. The EEOC defines "sexual harassment" as "unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature."[1] Conduct may constitute sexual harassment when:[2]

- It is an employment condition — submission to sexual conduct is made a term or condition of employment.
- It is an employment consequence — submission to or rejection of sexual conduct is used as a basis for employment decisions affecting individuals.
- It is an offensive job interference — the conduct unreasonably interferes with an employee's work performance or creates an intimidating, hostile or offensive work environment.

Sexual harassment covers both sexes and can include women making sexually explicit statements or creating a hostile environment for men. In *Oncale v. Sundowner Offshore Services*, the U.S. Supreme Court ruled that sexual harassment of a member of the same sex also violates the law.[3]

The courts and government enforcement agencies define two broad categories of sexual harassment, *quid pro quo* and hostile environment. Understanding the differences between the categories is important because each category creates different liability for employers.

Quid Pro Quo Sexual Harassment

Quid pro quo (literally, "this for that") is the more easily recognized type of sexual harassment defined by the courts. *Quid pro quo* sexual harassment typically occurs when a person who has the power to influence an employment decision or condition seeks a sexual favor in return for a positive outcome. The common example is when a supervisor demands that an employee consent to some form of sexual behavior to receive an employment benefit or to continue employment.

Quid pro quo harassment occurs when "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual..."[4]

Hostile Environment Sexual Harassment

Hostile environment sexual harassment is sometimes more subtle and difficult to recognize than *quid pro quo* sexual harassment. Hostile environment sexual harassment occurs when sexual jokes, suggestive remarks, cartoons, physical interference with movement (such as blocking a person or following a person) and sexually derogatory comments create an offensive working environment. Hostile environment sexual harassment does not target an employment benefit or continued employment. Supervisors, co-workers and nonemployees can commit hostile environment sexual harassment.

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[1] 29 CFR sec. 1604.11

[2] 29 CFR sec. 1604.11

[3] *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998)

[4] 29 CFR sec.1604.11(a)

Federal Law Prohibits Sexual Harassment

Title VII of the Civil Rights Act of 1964 (Title VII) is the federal law that prohibits sexual harassment. It states:

> It shall be an unlawful employment practice for an employer — to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[5]

In *Meritor Savings Bank v. Vinson*, the U.S. Supreme Court ruled that sexual harassment violates the Title VII prohibition of sex discrimination.[6] In its decision, the Court upheld the EEOC guidelines defining two types of sexual harassment, *quid pro quo* and hostile environment. The guidelines specify that unwelcome sexual conduct constitutes sexual harassment when submitting to sexual conduct is made either explicitly or implicitly a term or condition of an individual's employment.[7]

Affirmative Sexual Harassment Defense Under Federal Law

The U.S. Supreme Court created a defense to liability in limited circumstances, now known as the "Ellerth/Faragher" defense. The Ellerth/Faragher defense applies to hostile environment sexual harassment cases in which a hostile work environment occurred, but employer-sanctioned, adverse employment action did not occur.

It allows an employer to show that it exercised reasonable care to prevent and promptly correct sexually harassing behavior and that the complaining employee failed to take advantage of available internal preventive or corrective opportunities.[8] For more information, see "Liability for Harassment by Supervisors" on page 801.

In *Adams v. Reilly Automotive Inc.*, an employee claimed that she suffered sexual harassment at the hands of her supervisor for more than 2.5 years. She admitted that she never reported his actions to company officials during that time. She also admitted that the employer fired the supervisor two days after she made a complaint through the employer's sexual harassment hotline.[9]

The Eighth Circuit Court of Appeals found that the employer's anti-harassment policy was more than reasonable for purposes of the Ellerth/Faragher defense to sexual harassment under the Title VII of the Civil Rights Act.

The court reasoned that the employer maintained a zero tolerance policy that required investigation and documentation of every report of sexual harassment. The policy was widely disseminated through training videos and handbooks for all new employees, as well as posters displayed in all stores. The court also found that there was nothing objectionable in the employer requiring confirmation of sexual harassment before taking action against alleged harassers. Finally, the employer demonstrated the unreasonableness of the employee's failure to report the supervisor's harassment sooner.

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[5] 42 U.S.C. 2000e-2(a)

[6] *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)

[7] 29 CFR sec. 1604.11 (a) (1)

[8] *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. [illegible]

[9] *Adams v. Reilly Automotive, Inc.*, 538 F.3d 926 (8th Cir., 2008)

California Law and Sexual Harassment

In California, sexual harassment laws are part of the Fair Employment and Housing Act (FEHA).[10] The California Department of Fair Employment and Housing (DFEH) enforces FEHA. Sexual harassment is defined to include:[11]

- Verbal harassment, such as epithets, derogatory comments or slurs
- Physical harassment, such as assault or physical interference with movement or work
- Visual harassment, such as derogatory cartoons, drawings or posters

FEHA considers unwelcome sexual advances of an employer toward an employee of the same sex and harassment as unlawful sexual harassment under FEHA.[12] FEHA also prohibits unlawful harassment on the basis of gender identity or gender expression.[13] FEHA defines "sex" as including pregnancy, childbirth, breastfeeding and related medical conditions.

Applicants, unpaid interns, volunteers and independent contractors have the same protections as employees.

Under FEHA, sexually harassing conduct does not need to be motivated by sexual desire to be considered unlawful.[14] For instance, in some harassment situations, the perpetrator acts out of hostility toward the individual because of the individual's gender or sexual orientation, not out of sexual desire. The law clarifies that hostile treatment based on someone's gender can amount to unlawful sexual harassment regardless of whether the treatment was motivated by any sexual desire. For more information, see "Nonsexual Conduct" on page 795.

Earlier court cases had reached similar conclusions, and this amendment to FEHA was intended to clarify the law.

In *Mogilefsky v. Superior Court*, a California Court of Appeal ruled that sexual harassment is not only conduct that discriminates against a person solely because of his/her sex. It also includes unwelcome sexual conduct of a verbal or physical nature regardless of the harasser's or victim's gender or sexual orientation. The court further held that the harasser's motive was irrelevant. Whether sexual conduct is motivated by hostility or by sexual interest, it is still sexual harassment.[15]

FEHA does not apply to religious associations or certain nonprofit corporations.[16] For more information, see "Exemptions for Religious Corporations and Associations" in Chapter 26, page 734.

New 2016

The Fair Employment and Housing Council has submitted proposed FEHA regulations to the Office of Administrative Law for approval. These proposed regulations include changes to:

- Mandatory harassment training
- Employer written policies
- Preventions and correction
- Expanded definitions.

At this time, these proposed regulations are still under consideration.

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[10] Govt. Code sec. 12900 et seq.

[11] 2 CCR sec. 11019(b)

[12] Govt. Code sec. 12940(j)(4)(C)

[13] Govt. Code sec. 12940(j)

[14] Govt. Code sec. 12940(j)(4)(C)

[15] *Mogilefsky v. Superior Court*, 20 Cal. App. 4th 1409 (1993)

[16] Govt. Code sec. 12940 (j)(4)(B)

Independent Contractors and Sexual Harassment

FEHA protects independent contractors from sexual harassment and from harassment on the basis of belonging to all other classes that FEHA protects.[17] For more information on the definition of an independent contractor, see "Independent Contractors" in Chapter 6, page 96. It is illegal to harass an independent contractor or individuals "providing services pursuant to a contract" on the basis of any protected class, such as race, religion, sex or age.

If a hiring entity knew or should have known that another employee, other than a supervisor, was harassing an independent contractor, and the hiring entity did not take immediate and appropriate corrective action, the hiring entity may be held liable for the sexual harassment. A hiring entity must take all reasonable steps to prevent harassment from occurring.

The law does not specify your level of liability when an employer's agent or supervisor harasses an independent contractor. California courts have held employers strictly liable for sexual harassment of an employee by a supervisor.[18] However, it is unknown if strict liability extends to the person who supervises or approves the contractor's work if the person sexually harassed an independent contractor.

A recent case, *Hirst v. City of Oceanside*, serves as a good reminder of employer obligations with respect to preventing harassment in the workplace.[19]

The case involved a phlebotomist, Kimberli Hirst, who worked for American Forensic Nurses, Inc. (AFN), a company that provides phlebotomy services to law enforcement agencies that need blood samples drawn for DUI testing, etc. AFN had a contract with San Diego County, including the Oceanside Police Department. Hirst was hired to work on an on-call basis in the area that included Oceanside.

About one month into her work, Hirst was drawing blood at the Oceanside Police Department when an Oceanside police officer began making sexual comments to her. He repeated this behavior over the next several months.

Hirst's AFN supervisor noticed the problem, leading Hirst to confide in her supervisor about the harassing behavior. The conduct was reported to an Oceanside sergeant.

After the harassment was reported, the offending officer was told by his supervisor to stay away from Hirst, but the harassment did not stop. The city conducted an investigation and concluded that the police officer had harassed Hirst. Hirst sued the City of Oceanside for sexual harassment in violation of the FEHA. A jury decided in her favor, awarding her $1.125 million in damages against the city.

The city appealed the jury verdict claiming, that Hirst wasn't entitled to FEHA protection. But the court of appeal disagreed and upheld the verdict finding that Hirst was protected as a "person providing services pursuant to a contract."

A "person providing services pursuant to a contract" is defined as someone who meets all of the below criteria:

- The person has the right to control the performance of the contract requirements and discretion over the manner of performance.
- The person is customarily engaged in an independently established business.
- The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

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[17] Govt. Code sec. 12940 (j)(1)

[18] *Kelly-Zurian v. Wohl Shoe Co.*, 22 Cal. App. 4th 397 (1994)

[19] *Hirst v. City of Oceanside*, 236 Cal.App.4th 774 (2015)

The court found that Hirst satisfied the statutory definition of a person providing services pursuant to a contract. The city argued that AFN was the entity providing contract services. Hirst, the city claimed, was not the "person" contracting with the city, but an employee of the independent contractor and was not entitled to FEHA's protections.

The court soundly rejected this argument. Companies with outside contractors coming onto the premises to perform any type of work should keep this case in mind.

Professional Relationships and Sexual Harassment

Sexual harassment can also occur in the course of a business, service or professional relationship in which a client or customer is sexually harassed.[20] The California Civil Code covers the following professional relationships:

- Doctor/patient
- Attorney/client
- Real estate agent/client
- Landlord/tenant
- Teacher/student
- Other similar relationships

Harassment can occur when the relationship in which the client or customer cannot terminate the relationship without suffering economic loss, disadvantages or personal injury.

Under the professional relationship sexual harassment law, verbal, visual and physical conduct of a sexual nature are covered forms of sexual harassment. The victim is not required to ask the harasser to stop the offensive conduct to be entitled to seek a legal remedy. The law covers emotional distress injuries, as well as violations of statutory and constitutional rights. Victims of professional relationship sexual harassment can seek traditional discrimination remedies.

Romantic Relationships and Favoritism

A California Supreme Court case, *Miller v. California Department of Corrections*, involved two female employees at a prison who claimed that the warden engaged in sexual affairs with several female employees. The plaintiff alleged that these employees received promotions, favorable assignments and other rewards. They sued for sexual harassment and retaliation under FEHA. The trial court and the Court of Appeal rejected their claims because the same disadvantages were experienced by all employees, male or female, who were not sexually involved with the warden. Moreover, the warden did not engage in improper sexual conduct toward either of complaining employees.

The California Supreme Court disagreed. Extensive sexual favoritism in a workplace can create a hostile work environment in which female employees can reasonably conclude that management views them as "sexual playthings" or that women must engage in sexual conduct with their supervisors to receive favorable treatment.[21]

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[20] Civ. Code secs. 51.9, 52

[21] *Miller v. California Department of Corrections*, 36 Cal. 4th 446 (2005)

Mandatory Supervisor Harassment Prevention Training

California employers with 50 or more employees must provide sexual harassment prevention training to all supervisors in California. Training must take place within six months of hire or promotion and every two years thereafter. The minimum employee count of 50 includes part-time and temporary employees, including those who are hired through temporary staffing agencies, and independent contractors. The employer is covered if there are 50 or more employees employed each working day in any 20 consecutive weeks in the current or preceding calendar year. Because the law does not specify that the 50 employees must be within the state, it applies to California employers with 50 employees total, including those outside the state.

If your business expands to 50 employees and/or contractors and becomes subject to this California law, you must provide training to supervisors within six months of their eligibility and every two years thereafter. Similarly, if you are a newly created business with fifty or more employees and/or contractors, you must provide training to supervisors within six months of your establishment and then every two years thereafter.

You must provide training to all employees with supervisory authority. "Supervisory authority" generally includes anyone possessing the authority to exercise independent judgment to:

- Hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees
- Direct other employees' work or adjust their grievances
- Effectively recommend any of these actions

Employees who make recommendations to managers about such matters must receive training if those recommendations are likely to result in managers taking employment actions.

The harassment prevention training must include information and practical guidance about federal and state sexual harassment laws, including harassment prevention and correction and remedies that are available to victims. The training must be "interactive," meaning that video training is not sufficient without discussion, role-playing, a question-and-answer session or other similar techniques led by a qualified trainer. Web-based training that is provided by qualified organizations, such as CalChamber, and that includes interactive components, meets the requirements.

Employers subject to the mandatory sexual harassment prevention training requirement must also include a component on the prevention of "abusive conduct."

CalChamber's ***California Harassment Prevention Training - 2 Hour Supervisor Version*** contains this curriculum. Purchase at store.calchamber.com.

An employer with a multi-lingual workforce should take additional steps to make sure that the training is clearly and effectively communicated to employees who speak a language other than English. An employer should make sure to translate policies and communicate them in the language(s) spoken by its workforce.[22] For more information, see "Liability for Harassment Between Co-Workers" on page 803.

Meeting the harassment training requirements does not necessarily provide a defense against sexual harassment or a sexual harassment lawsuit. Failing to meet the harassment training requirements does not necessarily establish employer liability for harassing behavior under FEHA.

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[22] *EEOC v. The Spud Seller, Inc.*, 899 F.Supp.2d 1081 (D.CO. 2012)

Tracking Harassment Training

State regulations permit employers to use individual tracking or training year tracking:

Individual Tracking: You can track your training requirement for each supervisor on an individual calendaring basis. You measure two years from the date that the supervisor last completed training.

> **Example:** An employer hires a new supervisor on April 15, 2016. The supervisor received harassment prevention training on September 22, 2016 — meeting the training requirement of "within six months of hire or promotion." That supervisor must be retrained by September 21, 2018, to satisfy the "every two years" requirement.

Training Year Tracking: You can designate a "training year" in which you train your supervisors. You must retrain all supervisors every two years by the end of the designated training year, even those newly hired or promoted supervisors that received training in the prior year.

> **Example:** An employer trained all supervisors in 2015 and schedules 2017 as the next training year. An employee was promoted to supervisor on February 5, 2016, and received the initial training on June 10, 2016 — meeting the training requirement of "within six months of promotion or hire." That supervisor must be retrained by December 31, 2017, to align with the company's training year schedule.

You may not need to retrain newly hired supervisors who received sexual harassment training from their previous employers. The regulations allow employers to accept an employee's previous training as valid and to schedule the individual training based on the prior training date. However, the new employer must prove that the prior training was sufficient and meets the legal requirements of AB 1825. In addition, the supervisor must read and acknowledge receiving the new employer's anti-harassment policy within six months of being hired or promoted.

Harassment Training Documentation and Records Requirements

A supervisor's training record must include the following information:

- The supervisor's name
- The training date
- The training type
- The training provider's name

You must retain these records for a minimum of two years. You must be able to provide copies upon request.

Types of Harassment Training

There are four types of sexual harassment training:

- Classroom training, also known as in-person training
- E-learning
- Webinar
- Other

Classroom training — Also referred to as in-person training, classroom training features content that was created by a trainer. The supervisors receive the training from a trainer in a setting that is removed from the supervisor's daily duties. California law specifically defines the credentials that a qualified trainer must possess.

E-learning — Individualized, interactive and computer-based training that was created by a trainer and an instructional designer. Supervisors must have the opportunity to ask a trainer questions and receive a response within two business days after asking the questions.

Webinar — An Internet-based seminar that features content that is created and taught by a trainer and that is transmitted over the Internet or an intranet in real time. Employers who use a webinar for training must document that each supervisor who is not physically present in the same room as the trainer actually attended the training. Further, they must document that the supervisor actively participated in the training's interactive content, discussion questions, hypothetical scenarios, quizzes or tests and activities. Webinars must provide supervisors with the opportunity to ask questions and receive answers to those questions or otherwise seek guidance and assistance.

Other — The regulations authorize other effective, interactive training including audio, video or other computer technology only in conjunction with classroom, webinar or e-learning training.

Subjects Covered

In order to satisfy the mandatory training requirements, the training must include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment.

The training and education must also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination and retaliation.

The learning objectives of the training, according to the regulations, are to:

- Assist California employers in changing or modifying workplace behaviors that create or contribute to "sexual harassment," as that term is defined in California and federal law; and
- Develop, foster and encourage a set of values in supervisory employees who complete mandated training that will assist them in preventing and effectively responding to incidents of sexual harassment.

Under the regulations, a training course must cover at least all of the following required content:[23]

A definition of unlawful sexual harassment under California and federal law, other forms of harassment, and how harassment can cover more than one basis.

- FEHA and Title VII statutory provisions and case law concerning the prohibition against and the prevention of unlawful sexual harassment, discrimination and retaliation in employment.
- The types of conduct that constitutes sexual harassment, strategies to prevent harassment.
- The remedies available to harassed victims.
- The limited confidentiality of the complaint process.
- Strategies to prevent sexual harassment in the workplace.

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[23] 2 CCR sec. 11023(c)

- Resources for victims of unlawful sexual harassment, such as to whom they should report any alleged sexual harassment.
- The employer's obligation to conduct an effective workplace investigation of a harassment complaint.
- What the supervisor should do if personally accused of harassment.
- The essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed.

A new component on prevention of abusive conduct was added for 2015.

Training on the Prevention of Abusive Conduct

Employers subject to the mandatory sexual harassment prevention training requirement must include prevention of "abusive conduct" as a component of the training and education.

This new law does not mean that an employee can sue for abusive conduct, or bullying, in the workplace, unless of course it becomes discrimination or harassment against a protected class; the law merely requires training on prevention of abusive conduct.

Abusive conduct is specifically defined under the new legislation as "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests."

Abusive conduct, as defined, may include:

- Repeated infliction of verbal abuse, such as the use of derogatory remarks, insults and epithets;
- Verbal or physical conduct that a reasonable person would find threatening, intimidating or humiliating; or
- The gratuitous sabotage or undermining of a person's work performance.

The new law states that a single act does not constitute abusive conduct, unless especially severe and egregious.

If you are training your supervisors after January 1, 2015, make certain your training provider has included a component on the prevention of abusive conduct.

Evaluating Harassment Prevention Training

When you review a harassment prevention training course to determine the most effective training for your company, use this checklist to make sure that you have all of the necessary information on the course, curriculum and trainers. Make sure that the course, curriculum and trainers meet the following criteria.

- Course qualifications:
  - Does the course provide a minimum of two hours of training, either in a classroom, a webinar or online through an e-learning program?
  - Does the course provide interactivity through discussions, skill-building activities or quizzes so the supervisor is engaged throughout the training?
  - Does the course include a qualified expert who is available to answer questions, whether face-to-face or using email?

- The course must contain each of the following AB 1825 required components:
  - Does the curriculum contain FEHA and Title VII definitions of unlawful sexual harassment?
  - Does the curriculum contain additional definitions, training and discussions of other forms of harassment that FEHA covers (as specified in Government Code section 12940 (j))?
  - Does the curriculum contain a discussion about how sexual harassment can take several forms?
  - Does the curriculum contain an explanation of FEHA and Title VII and case law principles about the prohibition against and the prevention of unlawful sexual harassment, discrimination and retaliation in employment?
  - Does the curriculum contain examples of conduct that constitute sexual harassment, including practical examples that show true-to-life scenarios from case law, news and media accounts, hypothetical situations based on possible workplace interactions and other sources that illustrate sexual harassment, discrimination and retaliation through the use of role playing, case studies and group discussions?
  - Does the curriculum contain information on the remedies available to employees for sexual harassment?
  - Does the curriculum contain strategies to prevent sexual harassment in the workplace?
  - Does the curriculum contain an explanation of the limited confidentiality of the harassment complaint process?
  - Does the curriculum contain a listing of resources for sexual harassment victims and the steps they should take to report any alleged sexual harassment?
  - Does the curriculum contain an explanation of your obligation to conduct an effective workplace investigation of a harassment complaint?
  - Does the curriculum contain information on what to do if a supervisor is personally accused of harassment?
  - Does the curriculum contain a discussion of the essential elements of an anti-harassment policy and how to use it if a complaint is filed?
  - Does the curriculum contain a discussion on the prevention of abusive conduct, as defined by the law?
  - Does the curriculum contain a sample policy, whether generic or company-specific?
- Qualified trainers:
  - Check the trainer's credentials to make sure that he/she meets the qualifications under the regulations. If you decide to use an online e-learning course, confirm that a qualified trainer and instructional designer wrote and created the material.

    The trainer must be one of the following:
  - An attorney who has been admitted for two or more years to the bar of any U.S. state and whose practice includes employment law under FEHA and/or Title VII of the federal Civil Rights Act of 1964.
  - A human resources professional or harassment prevention consultant who has a minimum of two years of practical experience in sexual harassment prevention training, responding to sexual harassment complaints, conducting harassment complaint investigations and advising employers or employees about discrimination, retaliation and sexual harassment.

  - A professor or instructor in a law school, college or university who has a post-graduate degree or California teaching credential and 20 instruction hours or two or more years of experience teaching employment law under FEHA and/or Title VII of the federal Civil Rights Act of 1964.

  Additional qualifications for the trainer include knowledge of the following topics:

  - What constitutes unlawful harassment, discrimination and retaliation, as defined by California and federal law.
  - What steps to take when harassing behavior occurs in the workplace.
  - How to report harassment complaints.
  - How to respond to a harassment complaint.
  - Your obligation to conduct a workplace investigation of a harassment complaint.
  - What constitutes retaliation and how to prevent it.
  - The essential components of an anti-harassment policy.
  - The effect of harassment on harassed employees, co-workers, harassers and employers.
- Practical considerations
  - In addition to making sure that a sexual harassment prevention training course meets legal requirements, pay attention to a course's administrative features and ease of use.

Farm Labor Contractors - Harassment Prevention Training Requirements

Special harassment prevention training rules apply to farm labor contractors.

Farm labor contractors must provide a written statement to the state Labor Commissioner certifying that its employees received required sexual harassment training in order to receive a farm labor contractor's license.[24]

Under this law, farm labor contractors must train supervisory employees for at least two hours *each calendar year* in the prevention of sexual harassment in the workplace, unlike the once every two years requirement for supervisors under AB 1825.

Nonsupervisory employees also have to be trained at the time of hire and once every two years thereafter in identifying, preventing and reporting sexual harassment in the workplace; AB 1825 does not contain a nonsupervisory employee training requirement.

The training can be administered by a licensee or appropriate designee of the licensee.

The training, at a minimum, needs to include the following components:

- The illegality of sexual harassment.
- The definition of sexual harassment under applicable state and federal law.
- A description of sexual harassment, utilizing examples.
- The internal complaint process of the employer available to the employee.
- The legal remedies and complaint process available through the Department of Fair Employment and Housing.
- Directions for how to contact the Department of Fair Employment and Housing.

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[24] Lab. Code sec. 1684

These components can be found in the sexual harassment information sheets or pamphlets that employers need to give employees under Government Code section 12950. The trainer may use the text of the Department of Fair Employment and Housing's pamphlet DFEH-185, "Sexual Harassment" as a guide to training, or may use other written material or other training resources covering the required information.

At the conclusion of the training, the trainer needs to provide the employee with a copy of the Department of Fair Employment and Housing's pamphlet DFEH-185, and a record of the training on a form provided by the Labor Commissioner that includes the name of the trainer and the date of the training.

The licensee shall keep a record with the names of all employees who have received sexual harassment training for a period of three years.

Hostile Environment Harassment

In deciding if harassment is sufficiently severe or pervasive to create a hostile work environment, the EEOC traditionally evaluates the harasser's conduct from the objective viewpoint of a "reasonable person." If the challenged conduct would not substantially affect a reasonable person's work environment, then the conduct doesn't violate the law.[25]

In *Harris vs. Forklift Systems, Inc.*, the U.S. Supreme Court ruled that hostile environment sexual harassment exists if the conduct creates an "objectively hostile or abusive environment" that the victim subjectively perceives as abusive. Factors used to determine the perception's validity include the frequency of discriminatory conduct, its severity, whether the conduct is physically threatening or humiliating and whether the conduct unreasonably interferes with work performance.[26]

An employee can pursue a hostile environment claim even if he/she was subjected to only limited offensive sexual conduct. Both federal[27] and California[28] courts have held that proof that pervasive sexual harassment was directed at other female employees is evidence of a hostile work environment.

Nonsexual Conduct

In *EEOC v. National Education Assoc.*, the Ninth Circuit Court of Appeals ruled that offensive conduct from a supervisor need not be sexual in nature to constitute sexual harassment. Conduct such as shouting, using foul language, invading employees' personal space and making threatening gestures may violate the law if directed more at one group than another; for instance, directed at females more than males. See "Obscenities, Slurs and Sexual Harassment" on page 798 for more information.

Offensive conduct becomes illegal when it creates a more hostile work environment for one group than other groups and creates substantial and material adverse consequences. The Title VII prohibitions focus on the consequences of an employment practice instead of the motivation of co-workers, supervisors or employers.[29]

FEHA specifically states that sexually harassing conduct need not be motivated by sexual desire to be considered unlawful.

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25. EEOC Notice N-915-050 (3/19/90)
26. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993)
27. *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C. 1988)
28. *Fisher v. San Pedro Peninsula Hospital*, 214 Cal. App. 3d 590 (1989)
29. *EEOC v. National Education Assoc.* 422 F.3d 840 (9th Cir. 2005)

"Reasonable Victim" Standard

In *Ellison v. Brady*, the Ninth Circuit Court of Appeals decided that to determine if a hostile work environment exists, a court should determine if a "reasonable woman" in the position of the female victim, rather than a "reasonable person," would consider the conduct sufficiently severe or pervasive to create a hostile working environment. When evaluating the severity and pervasiveness of sexual harassment, courts should focus on the victim's perspective and not stereotyped notions of acceptable behavior.

"If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy," the court reasoned.

According to the court, a complete understanding of the victim's view requires an analysis of the different perspectives of men and women and, more importantly, the perspective of the individual who is making the harassment allegations. The court noted that the concept of what a "reasonable victim" would consider sufficiently severe or pervasive to create a hostile work environment can change over time. The standard of what is acceptable behavior should mirror those changes.

Even if the intention is not hostile, if a person in the victim's position, whether male or female, would consider the conduct offensive enough to alter working conditions, there could be basis for a sexual harassment claim. This is true even if the person who makes the comment intended it to be a compliment without sexual overtones.[30]

Single Incident of Sexual Harassment

Hostile environment harassment generally occurs when there is severe and pervasive conduct. A single incident may support a lawsuit depending on severity and effect on the employee's work environment.[31] For example, physical groping on a single occasion may amount to sexual harassment, depending on its nature.[32]

Staring and Sniffing as Sexual Harassment

In *Birschtein v. New United Motor Manufacturing, Inc.*, a California Court of Appeal held that staring, even when it is not done in a sexually suggestive manner, may constitute sexual harassment.[33] The court considered a case in which a female employee alleged that a male employee stared at her two to 10 times each day, each stare lasting from several seconds to 10 minutes, though never in a sexually suggestive manner. She had earlier reported the same man to her employer for overt sexual harassment, at which time he stopped speaking to her and began a staring campaign.

The court could not take the overt acts of harassment into account in the case because they were more than one year old and barred by the statute of limitations. However, the court held that a violation of gender-based harassment laws could be found based on the pattern of overt sexual harassment, followed by a complaint, followed by a retaliatory act; in this case, the staring.

Other behaviors besides staring can create a hostile environment.

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[30] *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991)

[31] *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991)

[32] *Myers v. Trendwest Resorts, Inc.*, 148 Cal.App.4th 1403 (2007)

[33] *Birschtein v. New United Motor Manufacturing, Inc.*, 92 Cal. App. 4th 994 (2001)

In *Royal v. CCC&R Tres Arboles, LLC*, an employee, Tonia Royal, worked as a leasing manager for an apartment complex for only four days. Royal sued her employer for sexual harassment under federal law, which provides similar protections against sexual harassment as California law.[34]

Royal worked at the only desk in a small front office. Royal claimed that two maintenance workers repeatedly entered her office, hovered over her head as she sat at the desk, and sniffed her. She alleged that each worker did this about 12 times over the course of her brief period of employment. Sometimes the maintenance workers came in together, and sometimes each came in separately.

She complained about the behavior to her supervisor and also to the assistant manager, who told her to "let it slide." After she was fired, she filed a lawsuit against her employer.

A federal trial court initially dismissed Royal's claims before trial, finding that the conduct was not unlawful under Title VII. The lower court judge reasoned that "no one touched Royal" and the conduct was not objectively offensive. Royal appealed the dismissal.

The 5th Circuit Court of Appeal ruled for her, allowing her to proceed to trial with her claims. "The sniffing and hovering over a woman, by two men, in a small, confined space could be viewed by a reasonable jury as harassment based on Royal's sex," the court said.

"Hearsay" and Sexual Harassment

An employee cannot successfully claim hostile work environment sexual harassment based only on her belief that other women in her workplace were harassed and that her employer was not vigorously investigating those complaints. The Second Circuit Court of Appeals held that "sexual harassment by hearsay" is not "sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."[35]

In *Leibovitz v. New York City Transit Authority*, the court considered the case of Diane Leibovitz, a New York Transit Authority employee who allegedly suffered emotional trauma when she heard about the harassment of other women in her workplace. Leibovitz admitted she was unaware of the harassment at the time it was happening. A jury rejected Leibovitz's claims that she was harassed personally.

The court held that harassment of others in the workplace, which Leibovitz did not witness and which came to her through hearsay, did not adversely affect the terms and conditions of her own employment. The court said the harassment "might as well have been going on in a nearby office of another firm, or been the subject of an infuriating newspaper article, or been a false rumor of a kind that would be upsetting if true." Allowing claims under these circumstances "would open the door to limitless employer liability, and allow a recovery by any employee made distraught by office gossip, rumor, or innuendo."

Although the court rejected sexual harassment by hearsay, it did reaffirm that evidence of harassment directed at co-workers can be used to support an employee's claim that he/she was personally subjected to harassment.

Sexually Oriented Posters

Sexually oriented posters in the workplace could create a hostile work environment sufficient to constitute sexual harassment.

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[34] *Royal v. CCC&R Tres Arboles, LLC*, 736 F.3d 396 (5th Cir. 2013)

[35] *Leibovitz v. New York City Transit Authority*, 252 F.3d 179 (2d Cir. 2001)

In *Robinson v. Jacksonville Shipyards Inc.*, a female shipyard employee sued her employer, claiming that a number of posters and calendars depicting nude or scantily dressed women were consistently allowed to be posted in the shipyard. The court held that sexually oriented pictures created a hostile work environment, and that these posters unlawfully stereotyped women as sex objects.[36]

Same Sex Harassment

An unwelcome sexual advance from a person of the same gender is considered sexual harassment. Under FEHA, an unwelcome sexual advance of an employer toward an employee of the same sex is considered sexual harassment.[37]

In *Mogilefsky v. Superior Court*,[38] a California Court of Appeals decided that sexual harassment includes unwelcome conduct of a verbal or physical nature, regardless of the gender or sexual orientation of the harasser or victim. The court also stated that the harasser's motive was irrelevant.

Obscenities, Slurs and Sexual Harassment

Obscenities in the workplace can create a hostile work environment sufficient to constitute sexual harassment. If obscenities are directed specifically toward one gender, they may constitute sexual harassment. Remember, under FEHA, harassment does not need to be motivated by sexual desire to be actionable.

In one case, *DFEH v. Sigma Circuits, Inc.*, a supervisor constantly used obscenities such as "son of a bitch" and "goddamn" and accompanied these expressions with sexual jokes about oral copulation and attempts to peek under women's skirts. The case went before an administrative tribunal, which found that the supervisor created a hostile work environment and engaged in sexual harassment. The employer was held liable for the harassment, and the supervisor was held personally liable as the employer's agent.[39]

In another case, *Singleton v. U.S. Gypsum*, an employee alleged that abusive comments were directed specifically at his sexual identity as a male. The court ruled that this conduct would not have been directed at a female and thus occurred because of the employee's sex.[40]

Companies can be held liable for sexual harassment when employees are subjected to slurs based on gender stereotypes. In *Nichols v. Azteca Restaurant Enterprises, Inc.*, the Ninth Circuit Court of Appeals held that harassment and slurs based on stereotypes of how men and women should act amount to sex discrimination and violate sex discrimination laws.[41]

Although FEHA prohibits harassing conduct that creates a work environment that is hostile or abusive on the basis of sex, FEHA does not outlaw sexually coarse and vulgar language or conduct that merely offends and is not based on either sexual interest or "animus" — hostility based on the person's gender.

In *Lyle v. Warner Brothers Television*, the California Supreme Court considered if sexual discussions among the writers of the television program *Friends* exposed a staff member who heard the discussion, as part of her job, to hostile work environment sexual harassment under FEHA. The court rejected the employee's sexual harassment suit. In doing so, the court announced a valuable guide to understanding the conduct that creates a hostile work environment. Although the writers engaged in lewd talk and gestures, the talk did not involve and was not aimed at the employee or any other women in the workplace. Therefore, the court argued, no reasonable person could conclude that the particular comments were severe enough or sufficiently frequent to create a work environment hostile or abusive to the employee.

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[36] *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991)

[37] Govt. Code sec. 12940(j)(4)(C)

[38] *Mogilefsky v. Superior Court*, 20 Cal. App. 4th 1409 (1993)

[39] *DFEH v. Sigma Circuits, Inc.*, FEHC No. 88-14 (July 28, 1988)

[40] *Singleton v. U.S. Gypsum*, 140 Cal. App. 4th 1547 (2006)

[41] *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001)

The use of vulgar or sexually disparaging language may be relevant to show discrimination or harassment. However, supervisors or co-workers who use crude language in front of employees without directing sexual innuendos or gender-related language toward an employee or women in general, do not create a hostile work environment. The critical issue is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. A plaintiff must prove that the language contains more than offensive sexual connotations. The language must actually constitute discrimination because of sex.

Offensive physical or verbal conduct that is directed at another person is generally considered less offensive and severe than conduct directed at the complaining employee and requires greater severity or frequency to result in liability. An employee who does not suffer a loss of tangible job benefits must show that the sexually harassing conduct created a hostile working environment.[42]

Constructive Discharge

A "constructive discharge" exists when an employer creates intolerable working conditions, such as sexual harassment, that could compel a reasonable employee to quit, whether or not the employer specifically intended to force the employee's resignation.[43] Constructive discharge is the basis for a wrongful termination claim.

To succeed in a constructive discharge claim, the employee must show that he/she left his/her job within a "reasonable amount of time" after the last act of discrimination or harassment.[44] If the alleged victim, without good reason, bypasses an existing internal complaint procedure that he/she knew to be effective, particularly if the company took sufficient remedial action after investigating the victim's complaint, neither the EEOC nor the courts would likely find constructive discharge.[45] For more information, see "Understanding Constructive Discharge Claims" in Chapter 29, page 898.

If too much time passes between the act of harassment and the resignation, the constructive discharge case may fail. For instance, the evidence in *Montero v. AGCO Corp.* showed that by the time the employee resigned, she was no longer subject to intolerable working conditions.[46]

Retaliation

Both state and federal law prohibit retaliation against employees who bring claims of sexual harassment or other unlawful harassment. Both state and federal law also prohibit retaliation against anyone who provides information during an investigation or lawsuit.

Employers need to realize that beyond traditional discrimination claims, such as sex or race discrimination, retaliation is a real concern. Retaliation claims continue to rise on a state and federal level.

Employees have the right to complain of unlawful discriminatory or harassing treatment in the workplace. After such a complaint is handled, regardless of the outcome, the employer should focus on getting everyone involved back to a productive working environment.

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[42] *Lyle v. Warner Brothers Television*, 38 Cal.4th 264 (2006)

[43] *Davis v. Tri State Mack Distributors, Inc.*, 981 F.2d 340 (8th Cir. 1992)

[44] *Smith v. Bath Iron Works Corp.*, 943 F.2d 164 (1st Cir. 1991)

[45] *Paroline v. Unisys Corp.*, 900 F.2d 27 (4th Cir. 1990), *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342 (2004)

[46] *Montero v. AGCO Corp.*, 192 F.3d 856 (9th Cir. 1999)

Retaliatory actions, such as demotions, pay raise denials, criticism for bringing complaints, or termination can result in large jury awards.[47]

Protection From Retaliation for Participating in Investigation

Employees who participate in harassment investigations, as witnesses, for example, are protected under federal and state laws.

In *Crawford v. Metropolitan Government of Nashville,* the U.S. Supreme Court ruled that protection against retaliation extends to an employee who speaks up during an investigation into sexual harassment.[48] The U.S. Supreme Court stated that a person can oppose harassment by responding to someone else's question just as surely as by bringing a complaint themselves. Nothing in the law requires a "freakish rule" that protects an employee who reports discrimination on her own initiative, but does not protect an employee who reports the same discrimination in the same words when her boss asks a question.

Retaliation Claims Can Proceed Even When Harassment Claim Fails

The Ninth Circuit Court of Appeal dismissed a female employee's sexual harassment lawsuit because the conduct was not severe or pervasive, but permitted the employee's retaliation claim to proceed.[49] An employee who brings a claim or participates in an investigation is protected even if the underlying harassment claim turns out to be meritless.

The employee made several complaints to the president of the company about her supervisor's behavior and about a co-worker's sexually harassing comments. After a period of several weeks, the employee complained again to the president about more demeaning and critical behavior from the supervisor.

But the president, frustrated, said he was "tired of listening" to all of it and that "obviously [the employee] had a problem getting along with [her supervisor] and that it would be best if [she] got [her] personal items and left." She was then escorted from the building. The president claimed she wasn't fired, but quit.

The employee sued. The court found that the employee offered enough evidence to at least get to trial on the issue of whether the president terminated her because she had complained.

Circumstantial Evidence

There is no requirement that specific, direct evidence conclusively prove that an employee was fired in retaliation for filing a sexual harassment complaint. Circumstantial evidence, a series of events or actions taken together, are sufficient to establish employer liability in a claim for retaliatory discharge.

An employee's termination or demotion occurring close in time to filing of a harassment complaint creates an inference of retaliation for exercising her legally protected rights. Courts will look at all of the facts surrounding the employee's termination or demotion, including performance reviews and the company's response to the complaint, to determine whether the employer acted unlawfully.[50]

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[47] *Green v. LAIBCO, LLC,* 192 Cal. App. 4th 441 (2011)

[48] *Crawford v. Metropolitan Govt. of Nashville,* 129 U.S.846 (2009)

[49] *Westendorf v. West Coast Contractors of Nevada, Inc.*, 712 F.3d 417 (9th Cir. 2013)

[50] *Sylvester v. SOS Children's Villages Illinois, Inc.*, 453 F.3d 900 (7th Cir. 2006)

Minimizing Risks

Employers need to take steps to minimize their risks of retaliation claims:

- Develop zero tolerance anti-discrimination/harassment/retaliation policies
- Apply company policies and practices consistently
- Ensure that workplace rules and instructions are clear and well-disseminated to all employees
- Keep communication channels open
- Proactively respond to complaints. No matter how minor the conduct may seem, directly addressing problems early on can prevent escalation

Liability for Sexual Harassment

Conduct that constitutes sexual harassment can come from several sources, including supervisors, co-workers, customers and vendors. The courts determine who bears the liability for the harassing conduct when the conduct originates from different sources.

Employer Liability for Sexual Harassment

In most cases, the employer will be held responsible for harassment that occurs on the premises or in connection with the employment relationship. The degree to which the employer will be held liable depends, in part, on the unlawful conduct's source.

Liability for Harassment by Supervisors

Employers are strictly liable for sexual harassment of a subordinate by a supervisor. Strict liability means that the employer has absolute legal responsibility for any harm — the employer does not have to be found careless or negligent. The availability of a defense based on preventive action depends largely on whether the lawsuit is brought under state or federal law.

In *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*, the U.S. Supreme Court ruled that an employer has strict liability for sexual harassment by a supervisor.[51] This strict liability applies whether the harassment is *quid pro quo* or hostile environment.

Under California law, you may be held strictly liable for a supervisor's sexual harassment of a subordinate. You will not be held liable for acts that result from a completely private relationship that is unconnected with the employment that does not occur at the workplace or during normal working hours.

If sexual harassment occurs when an employee substantially deviates from employment duties for personal purposes, the California Supreme Court ruled that an employer is not strictly liable.[52]

Who Is a "Supervisor"?

Because employers can be strictly liable for the harassing acts of their supervisors, the question of who actually is a "supervisor" under federal and state law matters.

The U.S. Supreme Court decided an important case that determines who is a "supervisor" for purposes of employer liability in federal harassment cases brought under Title VII. The case, *Vance v. Ball State*

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[51] *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)

[52] *Farmers Ins. Group v. County of Santa Clara*, 11 Cal. 4th 992 (1995)

University, provides a narrow definition of a supervisor as one who has the power to hire and fire or effect other significant change in employment status.[53]

The *Vance* ruling may have little impact on cases brought under state law because California provides a statutory definition of who is a "supervisor" under the Fair Employment and Housing Act (FEHA). This definition is broader than the definition under Title VII.

Maetta Vance, a catering specialist at Ball State University (BSU), argued that she was repeatedly harassed by another employee, Saundra Davis, on the basis of her race. Vance sued the school under federal law, alleging that the university was automatically liable since Davis was Vance's supervisor. But the lower court held that Davis, who had no hiring and firing authority, was not Vance's supervisor and threw the case out before trial.

The Supreme Court agreed and found that Davis was not Vance's supervisor under Title VII. The Court ruled that an employer can be automatically liable for an employee's unlawful harassment only when the employer has given that employee the power to take "tangible employment actions" against the victim, such as hiring, firing demotion, promotion or transfer.

"Because there is no evidence that BSU empowered Davis to take any tangible employment actions against Vance, the judgment of the Seventh Circuit [holding that BSU is not automatically liable for Davis's actions] is affirmed," said Justice Samuel Alito, writing for the majority.

Although Davis directed Vance's daily activities, the parties agreed that she had no power to hire, fire, demote, promote, transfer or discipline Vance.

California provides a statutory definition of who is a "supervisor" under the FEHA. This definition is broader than the definition under Title VII, and the Vance decision may have little impact on cases brought under state law.

The definition of "supervisor" under state law is as follows:

> "Supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[54]

The state law definition of supervisor includes not just those with the power to make decisions, but also those with the authority to make recommendations. It further includes those with the responsibility for directing employees — which was the same authority possessed by the employee accused of harassment in *Vance*.

Prevention as a Complete Defense or to Limit Liability

Despite subjecting employers to strict liability for the harassing acts of supervisors, the U.S. Supreme Court in *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton* also created a defense to liability in limited circumstances, now known as the "Ellerth/Faragher" defense. In cases brought under federal law, the Ellerth/Faragher defense is available to employers in hostile environment harassment cases in which employer-sanctioned, adverse employment action did not occur. An employer can claim the Ellerth/Faragher defense to liability or damages if:

- The employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior.

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[53] *Vance v. Ball State University*, 133 S.Ct. 2434 (2013)

[54] Govt. Code sec. 12926(s)

- The complaining employee unreasonably fails to take advantage of any preventive or corrective opportunities the employer provides or to otherwise avoid harm.

However, the U.S. Supreme Court made clear that the Ellerth/Faragher defense is only available if the harassment did not result in a tangible adverse employment action, such as termination or demotion. If an adverse employment action occurs, then the employer's corrective or preventive actions do not prevent an employer's liability for a supervisor's conduct.

The Ellerth/Faragher defense does not guarantee that the employer can avoid liability in a sexual harassment lawsuit. A 2012 federal court decision emphasized the fact that a company should not merely go through the motions of posting policies and providing training. If the policies and training are inadequate or never fully implemented, the company cannot use the Ellerth/Farager defense to avoid liability.[55]

In *State Department of Health Services v. Superior Court of Sacramento County*, the court ruled that the Ellerth/Faragher defense is not applicable to FEHA sexual harassment claims. In harassment cases brought under state law, there is no complete defense to liability for the harassing acts of supervisors. However, while not allowing a complete defense, the court provided employers with the clear opportunity to reduce the extent of their liability in these cases.[56]

The court said that the "doctrine of avoidable consequences" is applicable to hostile environment cases as well as those involving a tangible employment event. You can limit damages by showing that:

- You took reasonable steps to prevent and correct workplace sexual harassment, including creating a clear policy that forbids sexual harassment, communicating a process that is available to employees to remedy improper conduct and providing appropriate training for employees and supervisors.
- The employee unreasonably failed to use the preventive and corrective measures that you provided.
- Reasonable use of your procedures would have prevented at least some of the harm that the employee suffered.

The court further explained that each case requires a fact-intensive analysis of the reasonableness of the employee's delay in reporting. Courts can consider how well the employer's policies were made known, the extent of employee training about available procedures, the reasonableness of the procedures in the context of the particular case, employee perception of the confidentiality and effectiveness of the employer's process for investigating and remedying claims and justifiable employee fear of retaliation.

This decision conflicts with a Ninth Circuit Court of Appeals ruling that the sexual harassment defense that the U.S. Supreme Court created for federal claims should apply to California claims brought under FEHA.[57]

Liability for Harassment Between Co-Workers

You are liable for harassment between co-workers only if you knew (or should have known) about the conduct and fail to take immediate and appropriate correction action.[58]

If you did not know about the conduct but should have known it was going on, you must show that you took reasonable steps to prevent harassment from occurring. These steps include distributing sexual harassment pamphlets, creating an anti-harassment policy and providing effective sexual harassment training.

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[55] *EEOC v. Management Hospitality of Racine*, 666 F.3d 422 7th Cir. (2012)

[56] *State Department of Health Services v. Superior Court of Sacramento County*, 31 Cal. 4th 1026 (2003)

[57] *Kohler v. Inter-tel Technologies*, 244F.3d 1167 (2001)

[58] 2 CCR sec. 11019(b)(3)

Liability for Sexual Harassment Occurring During Non-Work Hours

Employers are liable for a manager's sexual harassment of an employee even if off-duty and away from work. And, managers who socialize with subordinate employees may see or learn things about off-duty conduct that place the manager, and the company, at risk.

If a manager sees sexually harassing conduct of one employee by another, and does nothing to stop it, employees may argue that the manager and, by default, the company, sanctioned the conduct. Employees could also argue that having a manager present, even after work and off-site, turns a social event into a company-sponsored event.

Liability for Harassment by Nonemployees

You may be responsible for the acts of nonemployees who harass employees, applicants or independent contractors in the workplace if you, your agents or supervisors knew or should have known of the harassment and you fail to take immediate and appropriate corrective action. The obligation to protect against sexual harassment committed by nonemployees is part of FEHA. When reviewing sexual harassment cases that involve nonemployees, the DFEH, the EEOC and the courts consider the extent of your control of and legal responsibility for the conduct.[59]

Third Party Harassment

Though most employers know of their duty to protect employees from harassment by co-workers, employers must protect employees from harassment by third parties, such as customers.

Joyce Turman worked the night shift at a halfway house that transitioned felons from prison back into the workforce and society. Turman complained that she was frequently subject to sexual gestures, sexual propositions, and derogatory comments. The halfway house argued that the harassment by these former prisoners was inherently part of the job.

The court disagreed, and held that the employer has a duty to investigate and take corrective action, even when harassment may be inherently part of the job. Employers are not off the hook just because they have rude or inappropriate customers.[60]

Supervisor Liability for Sexual Harassment

Managers and supervisors serve as your first line of defense in avoiding liability for sexual harassment. Their actions or inaction can result in costly judgments against your company and themselves. In some circumstances, the supervisor may also be subject to personal liability.

Supervisors Liable for Engaging in Sexual Harassment

FEHA allows for personal liability for supervisors who sexually harass employees.[61] Although the company can be held partially legally responsible for the conduct, the supervisor's personal assets are also at risk.

In *Farmers Ins. Group v. County of Santa Clara*, the California Supreme Court decided that an employer is not obligated to reimburse a supervisory employee who was forced to pay money to settle a sexual harassment claim. The court said that sexually harassing conduct is outside of the scope of an employee's duties, and that the employer has no obligation to indemnify its employee for the cost of the misconduct.[62]

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[59] Govt. Code sec. 12940(j)(1)

[60] *Turman v. Turning Point of Central California Inc.*, 191 Cal.App.4th 53 (2010)

[61] *Page v. Superior Court of Sacramento County*, 31 Cal. App. 4th 1206 (1995)

Supervisor Not Liable for Not Stopping Harassment by Others

A supervisor who was not the harasser is not personally liable for failing to stop known sexual harassment. In *Fiol v. Doellstedt*, a California Court of Appeals decided that a supervisor who was informed that another employee was sexually harassing his subordinate was not personally liable for the sexual harassment simply because he failed to act on the complaint. The court ruled that the supervisor's failure to prevent the employee's sexual harassment did not make him personally liable for sexual harassment as the harasser's aider and abettor, the employer's aider and abettor or as an agent of the employer under FEHA. This decision does not eliminate the employer's or harasser's liability.[63]

Supervisor Not Liable for Retaliation

In *Jones v. The Lodge at Torrey Pines Partnership*, the California Supreme Court ruled that supervisors are not personally liable for retaliation under FEHA. Retaliation is different from harassment, for which supervisors can be held personally liable. At issue was the legal meaning of the word "person," and if the Legislature intended to make individual employees personally liable for retaliation.[64]

Employee Liability for Sexual Harassment

Employees can be held personally liable for sexual harassment. Therefore, the employee's personal assets are at risk.[65] Employees can be held personally liable for sexual harassment regardless of whether you know or should have known of the conduct.

You must reimburse employees for expenses they incur while performing their duties.[66] In *Jacobus v. Krambo Corp.*, a Court of Appeal addressed the question of when an employer must reimburse an employee for defense costs. Two co-workers admitted to joking and trading personal information on sexual matters at work. The court ruled that the employer's liability for reimbursement is based on whether the conduct was in the course and scope of employment.[67] The court noted that because a jury found that the male employee did not engage in sexual harassment and both parties admitted that the sexually explicit comments were consensual, the conduct was "part of the social intercourse that occasionally occurs in modern office settings."

Franchisor Liability for Sexual Harassment

Franchisors are generally not liable for employment claims brought by employees of the franchisee. In most instances, the franchisee, not the franchisor, is the "employer" and only the franchisee will be liable for employment claims. Franchise agreements are normally crafted in such a manner as to limit the potential liability of the franchisor for the franchisee's conduct.

A decision from the California Supreme Court in *Patterson v. Domino's Pizza, LLC.*, affirmed protections for franchisors. The court ruled that a franchisor, in this case Domino's Pizza, can't be held responsible for unlawful conduct committed by a franchisee's employee, where the franchisor exercises no control over the franchisee's relevant day-to-day operations, such as hiring, supervising and disciplining employees. The court ruled that Domino's lacked the general control to be liable as the employer in this situation.[68]

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[62] *Farmers Ins. Group v. County of Santa Clara*, 11 Cal. 4th 992 (1995)

[63] *Fiol v. Doellstedt*, 50 Cal. App. 4th 1318 (1996)

[64] *Jones v. The Lodge at Torrey Pines Partnership*, 42 Cal. 4th 1158 (2008)

[65] Govt. Code sec. 12940(j)(3)

[66] Lab. Code sec. 2802

[67] *Jacobus v. Krambo Corp.*, 78 Cal. App. 4th 1096 (2000)

In this case, Taylor Patterson, a 16-year-old employee of Sui Juris, a Domino's Pizza franchise, brought a sexual harassment claim against both Sui Juris (the franchisee) and Domino's (the franchisor). Patterson alleged she was sexually harassed and assaulted by an adult male assistant manager.

The state supreme court dismissed the lawsuit against Domino's, focusing on the fact that in this case the franchisee, not Domino's, retained control over the "day-to-day decisions involving the hiring, supervision, and disciplining of his employees." Although Domino's retained control over things such as branding and uniformity in products and services, it did not retain control over the day-to-day employment relationship.

The terms of the actual franchisor/franchisee agreement played an important role in the court's decision. The agreement:

- Stated that there was no principal-agent relationship between Domino's and the franchisee and that individuals who worked for the franchisee were employees of the franchisee with no employment or agency relationship with Domino's.
- Gave no authority to Domino's Pizza over the management of the franchisee's employees.
- Provided that the franchisee "shall be solely responsible for recruiting, hiring, training, scheduling for work, supervising, and paying the persons who work in the Store and those persons shall be your employees and not [Domino's] agents or employees."

The court's ruling does not mean that franchisors can never be held accountable for sexual harassment occurring at a franchised location. Franchise agreements are important, but the conduct of the franchisor in attempting to control franchisee operations may also be examined by the courts.

In this case, the court found that the actual practices of the franchisor and franchisee further demonstrated that Domino's did not exercise the necessary control over day-to-day operations:

- The franchisee owner had sole authority over who was selected for hire.
- The franchisee established its own personnel policies and controlled any training the employees received about how to treat each other at work and how to avoid sexual harassment. The owner implemented his own zero-tolerance sexual harassment policy and trained employees regarding it. Domino's did not provide any training on these issues. Training by Domino's was limited to activities such as pizza making and store operations.
- Domino's did not have a complaint procedure for franchisee employees to report harassment; only the franchisee had such procedures.
- The franchisee owner acted on Patterson's complaint by disciplining the assistant manager, without soliciting any advice from Domino's and understood that whether or how to discipline the manager was solely the owner's decision.

Courts will look at the actual circumstances and how much real control the franchisor exercises.

Franchisors may want to take a look at both their franchise agreements and their involvement in daily operations. Although a franchise agreement may state that an employment relationship does not exist and assign all authority for employment decisions to the franchisee, franchisors still need to examine what really happens in the field. Franchisors should consider seeking the advice of counsel as to how best to protect themselves from employment-related claims.

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[68] *Patterson v. Domino's Pizza, LLC.*, 60 Cal. 4th 474 (2014)

Sexual Harassment Claims and Lawsuits

Sexual harassment law contains complex procedural issues. State and federal laws overlap. State and federal court systems have created conflicting rules of law and remedies. There are time limits for when claims must be filed. There are procedural steps one must take to comply with the law. Besides the issue of overlapping federal and state laws, an employee or former employee might file a fabricated sexual harassment lawsuit.

Although some of these issues are discussed in this section and in Chapter 26, "Employment Discrimination," consult with legal counsel if you receive a sexual harassment claim or lawsuit.

Time Limits for Filing Sexual Harassment Claims

An employee who wants to file a lawsuit against an employer for sexual harassment must first file a claim with the DFEH within one year of the alleged violation or with the EEOC within 180 days of the alleged violation. If a charge is first filed with the DFEH, then a charge can be filed with the EEOC within 300 days of the alleged violation or within 30 days of receiving notice that the DFEH terminated its proceedings, whichever is earlier.

The time limit for filing claims is generally measured from when the harassment occurred. If the harassment occurred over a lengthy period of time, it is generally measured from the last unlawful act. Similar acts related in time can be part of the claim under the "continuing violations doctrine."[69]

The DFEH is authorized to file cases directly in court. For more information on the DFEH's investigation and filing of harassment charges, including mandatory dispute resolution, see "Filing a Discrimination Charge Under State Law" in Chapter 26, page 759.

Consult with legal counsel before responding to a claim of harassment or discrimination.

Avoiding DFEH Time Limits

A California Court of Appeals ruled that employees may avoid the DFEH/EEOC sexual harassment claim process, proceed directly to trial and even recover civil penalties and attorneys' fees under a state hate crime law.[70]

In a case including egregious facts, a janitorial employee brought a claim against her supervisor. The conduct escalated to the point that the male supervisor allegedly trapped the female employee in a bathroom stall, closed his arm around her neck to the point that she could not breath, and bit her. When she told him she was leaving, he pursued her to her car, threatened her, swore at her and banged on her steering wheel. The company allegedly discouraged her from contacting the police, took almost a month to contact her to set up an appointment to discuss her allegations, failed to interview key witnesses, and never disciplined the supervisor.

Rather than filing a claim under the Fair Employment and Housing Act (FEHA) for harassment, the employee sued alleging violations of California Civil Code section 51.7. This section is often referred to as the "Ralph Act," and the legislature enacted it to prevent hate crimes.

It provides that "[a]ll persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of" a protected characteristic, such as sex.

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69. *Richards v. CH2M Hill, Inc.*, 26 Cal.4th 798 (2001)

70. *Ventura v. ABM Industries Inc.*, 212 Cal.App.4th 258 (2012)

The trial court found that the Ralph Act applies in employment cases despite the significant overlap with FEHA.

At trial, the jury found that the supervisor committed "acts of violence" against the employee, and that the company "ratified" those acts and negligently supervised and retained the supervisor. The jury awarded the employee $100,000 in damages, $25,000 in civil penalties and $550,000 in attorneys' fees.

The court's decision opens the door for other plaintiffs to include allegation of violations of the Ralph Act in their harassment complaints, potentially subjecting employers to civil penalties and attorneys' fees. Unlike claims under FEHA, there is no requirement for a plaintiff to file an administrative claim prior to filing a lawsuit, and the statute of limitations is longer.

False Harassment Claim Can Lead to Disciplinary Action

You might face a situation involving an employee who fabricates a sexual harassment lawsuit.

A California appellate court ruled that an employee who fabricates a sexual harassment claim can be disciplined by the employer.[71] Per the court, if an employee makes false charges of harassment, an employer who terminates that employee because of the false charges has not engaged in retaliation.

Employers are forbidden from discriminating against an employee who participates in discrimination or harassment investigations. But the employee is not insulated from being disciplined for conduct that, if it occurred outside an investigation, would warrant termination or other discipline.

The court's ruling allows employers to discipline for false claims and is consistent with some federal decisions allowing the same. But employers should be wary about taking such action except in the most blatant of instances and, even then, only with the advice of counsel. It is likely that such action will result in the employee claiming retaliation. Unless you have strong evidence of fabrication, you are in for a long litigious road.

Though the employer was ultimately vindicated by the court in this case, it wasn't until after five years passed and the employer was dragged through administrative proceedings and a jury trial.

Admissibility of Employee's Prior Sexual Conduct With Harasser

In *Rieger v. Arnold*, Melanie Rieger filed a claim for sexual harassment against her law firm employer, its principal attorney and the office manager. After a jury ruled against her, Rieger appealed, arguing that certain evidence of her prior sexual conduct should not have been admitted in evidence. Section 1106 of the California Evidence Code prohibits evidence of specific instances of a plaintiff's sexual conduct to prove consent by, or the absence of injury to, the plaintiff. The sole exception applies to evidence of sexual conduct with the alleged perpetrator.

In response to a charge of hostile work environment, the court observed the defendant can attempt to show that the plaintiff either consented to the conduct or suffered no injury because the plaintiff did not find the conduct subjectively abusive. Evidence of the plaintiff's prior sexual conduct, including the use of off-color language, sexual horseplay and tales of prior, planned or proposed sexual exploits, can be admitted only when he/she engaged in them with the alleged perpetrator.

Finally, the court had to determine who is considered the "perpetrator" in cases that allege hostile work environment sexual harassment. It concluded that evidence of prior "sexual conduct" is admissible if it involved an individual defendant or others whose conduct is attributable to the employer, regardless of whether it occurred inside or outside the workplace.[72]

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[71] *Joaquin v. City of Los Angeles*, 202 Cal.App.4th 1207 (2012)

Admissibility of Supervisor's Prior Sexual Misconduct

In *Gober v. Ralph's Grocery Company*, an employer was found liable for the harassing acts of a manager and ordered to pay compensatory and punitive damages. The victims sought to introduce evidence of the manager's conduct prior to being assigned to their work location to support their case for punitive damages. The employer argued to exclude the evidence because it did not affect the employees involved in the lawsuit.

The court ruled that evidence of prior similar misconduct and the employer's knowledge and response was admissible when considering the extent of punitive damages. FEHA requires employers to take all reasonable steps necessary to prevent discrimination and harassment from occurring. An employer is liable if it knows or should have known of harassing conduct and fails to take immediate and appropriate corrective action. The evidence of misconduct at the manager's prior work location was relevant to whether the employer took sufficient action to prevent further misconduct when it decided to transfer the manager to another location in lieu of termination.[73]

The decision clearly suggests that an employer who transfers a harasser to another facility as a remedy for sexual harassment runs the risk of substantial punitive damages if the conduct is repeated.

Effective Anti-Harassment Policies and Required Postings

Employers in California have an obligation to inform employees about their protections against harassment in the workplace. This is part of the employer's duty to ensure a workplace free from harassment. These obligations include posting and notice requirements, creating anti-harassment policies for employee handbooks and training. Employers should ensure that an effective complaint mechanism is in place and that employees are aware of the process.

Anti-Harassment Policies

It is very important to implement anti-harassment policies. These policies must contain effective internal complaint procedures. The fact that you maintain an anti-harassment policy and an internal complaint procedure does not completely insulate you from liability for sexual harassment. If your policy does not specifically prohibit sexual harassment or if your procedure requires that an employee must first report an incident to a supervisor who might actually be the harasser, the policies and procedures are not effective.

In your anti-harassment policy:

- Clearly describe the types of conduct that constitute harassment under state and federal laws.
- Prohibit conduct that is disrespectful or unprofessional.
- Include an enforceable statement that the company's rules prohibit this conduct, regardless of whether the conduct amounts to a legal violation.
- Make sure that the policy includes a statement about an employee's right to complain about harassment without fear of retaliation.
- Explain that the employee need not complain to his/her supervisor or directly to the harasser.

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[72] *Rieger v. Arnold*, 104 Cal. App. 4th 451 (2002)

[73] *Gober v. Ralph's Grocery Company, Inc.*, 128 Cal. App. 4th 648 (2005)

- Explain your process for promptly, thoroughly and objectively investigating all complaints — harassment as well as other prohibited conduct.
- Include a statement that you and your company will take appropriate and immediate measures to discipline offenders.

A policy also can state that if the harassment or other prohibited conduct harms the employee, the harm will be redressed.

For more information, see the "Anti-Harassment Policies" on page 809.

This policy, along with many more, is also available as part of CalChamber's ***Employee Handbook Creator***. Visit store.calchamber.com to find out more about how to create your employee handbook.

"Reasonable Steps" in a Multi-lingual Workplace

A multi-lingual workforce can make it more difficult for an employer to communicate anti-harassment policies to employees and make it more difficult for the employer to determine what "reasonable steps" it should take to prevent harassment.

A recent federal case addressed this issue. The Equal Employment Opportunity Commission (EEOC) filed a lawsuit against Spud Seller on behalf of a female employee, who alleged that a supervisor sexually harassed her. During the judicial proceedings, nine additional female employees were identified as victims of alleged harassment. All of the victims were Spanish-speaking employees.

In *EEOC v. The Spud Seller Inc.*, a federal court ruled that the employer could not use the Ellerth/Faragher defense in a sexual harassment lawsuit because the employer's policy was not translated into Spanish or that written translations of the policy were provided to Spanish-speaking employees. The employer did "explain" the policy once per year to employees, but, as the court noted, the person responsible for explaining and interpreting the policy for Spanish-speaking employees was the person accused of harassing female employees.[74]

In addition, the court found that the policy did not provide a meaningful remedy for Spanish-speaking employees because the employees could not make a complaint directly to the persons identified in the policy because they did not speak Spanish. An employee would have to supply an interpreter or ask another employee to interpret, which the court found deprived Spanish-speaking employees of their right to confidentiality.

Finally, the court found that the policy was deficient because it did not contain a provision explaining to employees that they could not be retaliated against because of making a complaint of sexual harassment.

Employers with multi-lingual workforces should take additional steps to make sure that their policies are clearly communicated and effective:

- Translate policies and communicate them in the language(s) spoken by your workforce.
- If possible, provide a complaint mechanism that identifies an official who speaks the language(s) of your workforce, or explain that an interpreter will be provided, if necessary.

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[74] *EEOC v. The Spud Seller, Inc.*, 899 F.Supp.2d 1081 (D.CO. 2012)

Required Postings and Notices

Employers of 15 or more employees must post the federal Equal Employment Opportunity poster in a prominent and accessible location in the workplace.

Employers must post, in a prominent and accessible location in the workplace, a state DFEH poster, which includes information on the illegality of sexual harassment. In addition, you must distribute to all employees a pamphlet on sexual harassment. This requirement is in addition to any policy in an employee handbook and/or to any posted policy. You must distribute pamphlets "in a manner that ensures distribution to each employee." For example, you can include the pamphlet in the employee's first paycheck or give it to him/her upon hire.[75]

At a minimum, the pamphlet must include the following information:[76]

- The illegality of sexual harassment
- The definition of sexual harassment under applicable state and federal laws
- A description of sexual harassment, using examples
- Your internal complaint process that is available to the employee
- The legal remedies and complaint process that are available through the DFEH
- Directions on how to contact the DFEH
- The DFEH regulatory protections against retaliation for opposing sexual harassment, filing a complaint with the DFEH or participating in an investigation, proceeding or hearing conducted by the DFEH. You can find these regulations in the California Code of Regulations, Title 2, section 11021.

California law does not specifically require that you provide sexual harassment pamphlets to independent contractors. However, if you are covered by FEHA, it may be prudent to provide pamphlets to independent contractors so they will be aware of your reporting and anti-harassment policies.

CalChamber's ***Sexual Harassment Hurts Everyone*** pamphlets encourage employees to bring sexual harassment concerns to your attention rather than to initiate legal action. CalChamber's ***Sexual Harassment Hurts Everyone*** pamphlets are available in packets of 20 in either English or Spanish. To order, call (800) 331-8877, or visit our online store at store.calchamber.com.

CalChamber's ***California and Federal Employment Notices Poster*** helps you comply with posting requirements. CalChamber has updated the poster to include the current version of all the required state and federal notices that every California employer must post, including the federal and state sexual harassment posters.

Conducting Appropriate Sexual Harassment Investigations

During an investigation, fully inform the complainant of his/her rights under your anti-harassment policy and any other relevant policy, such as an internal grievance policy.

To fully and effectively conduct an investigation, interview the complainant, the alleged harasser, any witnesses to the conduct and any other person who may have relevant information. Communicate the determination to the complainant and the alleged harasser. If you find that sexual harassment occurred, provide a prompt and effective remedy to the complainant and take disciplinary action against the harasser. Ensure that no further harassment occurs. Prevent retaliation against the complainant or any other employee who participated in the investigation.

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[75] Govt. Code sec. 12950(a)

[76] Govt. Code sec. 12950(b)

If you hire outside organizations to conduct sexual harassment investigations, ensure that the individual who conducts the investigation is a licensed attorney or a licensed private investigator in the state of California, as required under the California Business and Professions Code.

Licensed HR consultants are not legally able to conduct sexual harassment investigations unless they are also a California attorney or a licensed private investigator. If the investigated case is ever challenged, you risk the investigation's integrity and render any related decision vulnerable to attack. If your company uses outside resources to conduct sexual harassment investigations, consult with legal counsel before proceeding.[77]

Base sexual harassment investigations on guidelines that are provided in the following forms:

Harassment Investigation Interview Guidelines

Harassment Investigation Credibility Assessment Guidelines

Sexual Harassment Investigation Checklist

A formal investigation begins with meeting the complainant to determine if harassment may have occurred. When you determine that a formal investigation is warranted, you must plan how to conduct it. A poorly planned investigation may expose both the organization and the investigator to liability.

Cooperating in a workplace investigation related to discrimination or harassment is a protected activity. For more information, see "Retaliation" in Chapter 26, page 705. The state Fair Employment and Housing Act and federal Title VII prohibit discrimination against an employee for participating in a workplace investigation. On the other hand, employees also have a duty to cooperate and be truthful during a work place investigation.

In *McGrory v. Applied Signal Technology, Inc.*, a California court ruled that an at-will manager could be terminated for being uncooperative and deceptive during the company's investigation of a discrimination claim against him. The employee in this case lied during an investigation of gender discrimination charges brought against him. He also refused to answer specific questions regarding why he had put the employee on a performance improvement plan. The employee was terminated after several warnings for non-cooperation and sued. The court noted that "[l]ying during an internal investigation is disruptive of workplace discipline."[78]

An employee's conduct does not become "uncooperative" or "disruptive" just because the employer does not like what the employee has to say or disagrees with the employee's opinion. Employers should exercise caution and consult counsel before taking discipline for lying or uncooperative conduct during an investigation because of the potential for a retaliation claim. Employers with collective bargaining agreements also need to be aware that there may be special rights afforded during the investigative process.

Example of a Proper Investigation

The case of *Silva v. Lucky Stores, Inc.*, provides an example of an appropriate sexual harassment investigation.

[illegible]

[illegible]

Two female employees complained that Silva, the store manager, sexually harassed them. The alleged harassment included grabbing and slapping the employees on the buttocks. Other employees confirmed the incidents and related other examples of Silva's inappropriate behavior around female staff. Lucky terminated Silva, who then sued, claiming breach of an implied contract to terminate only for "just cause." The lower court dismissed the case. On Silva's appeal, the Court of Appeal agreed that Silva was terminated in "good faith" and dismissed the case.[79]

The Court of Appeal noted that the employer presented evidence that supported a good-faith investigation, including:

- Lucky maintained a written policy that specified how sexual harassment allegations were to be investigated. The policy stated that:
    - Complaints must be treated seriously and investigated immediately.
    - The matter must be treated confidentially.
    - Interviews must be conducted in a private area.
    - The investigator must listen to the allegations, make complete notes, attempt to identify all people involved and all possible witnesses and interview the accused employee.
- Lucky designated a specific employee, Jeff Szczesny, to investigate complaints of sexual harassment. His practice was to interview the employee against whom the allegation had been made and any employees who may have witnessed the alleged conduct. Szczesny interviewed 15 store employees, recorded the information that he obtained from each witness on a witness interview form and/or obtained a written statement from each witness.
- Szczesny was not involved in the allegations. He was trained by in-house counsel on how to conduct an investigation. His investigation was prompt. He kept written documentation of his interviews with witnesses. He asked important witnesses to provide their own written statements about the events.
- Szczesny asked relevant, open-ended and non-leading questions. He attempted to elicit facts rather than opinions or suppositions. He maintained confidentiality by conducting some of the interviews off store premises or by telephone. He encouraged witnesses to page him if they wanted to speak with him further. Szczesny's notes revealed that the employees whom he interviewed generally were happy with their jobs, an indicator that these were not disgruntled employees bent on causing trouble for Silva or others.
- Silva was promptly notified of the sexual harassment claims and given an opportunity to present his version of the incidents and to provide follow-up information. Witnesses received an opportunity to clarify or correct information provided by themselves or others.
- Silva was given a final opportunity to comment on the information that was obtained during the investigation.

The statements by the women who complained of harassment, the witnesses and Silva's admissions that he touched the two women and tickled, touched and patted other female employees led the court to conclude that the investigation met the necessary "good-faith" standard. This case illustrates the need to train individuals designated as investigators and the need to establish written policies about complaint and investigation procedures.

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[79] *Silva v. Lucky Stores, Inc.*, 65 Cal. App. 4th 256 (1998)

Example of an Improper Investigation

The case of *Steele v. Youthful Offender Parole Board* illustrates how an employer conducted an improper investigation into allegations of sexual harassment.[80] A female employee claimed constructive discharge and retaliation because of her involvement as a witness in a sexual harassment claim against one of her supervisors. The court found in favor of the female employee, in part because of the investigation of the employee's claim. Unfortunately for the employer, the evidence indicated that:

- The employee had been coerced into signing inaccurate statements about the sexual harassment.
- The employee received unsupported poor performance reviews.
- Her supervisors recommended that she look for a new job because of impending budget cuts, although there weren't any planned budget cuts.

A jury also found that the employer had made the working conditions so intolerable that a reasonable person would have no alternative but to resign.

In another case, a California court pointed out the critical missteps employers can make when faced with allegations of misconduct. Even if allegations of misconduct seem to amount to a "he said/she said" situation, a good faith investigation is required, and terminating a strong performing employee after a complaint of harassment can be fraught with legal peril.[81]

Focus on gathering information during the investigation process. Don't get caught up in the fear that it's a "he said/she said" situation. In the end, you should reach a conclusion. Examine the objective evidence and assess credibility. Don't forget common sense: In light of all the evidence, is it more likely than not that the person is telling the truth?

The case involved a nurse, Romeo Mendoza, who worked at the defendant hospital for more than 20 years with an excellent work history. In the fall of 2010, Mendoza alleged he was sexually harassed by his supervisor, Del Erdmann, who had recently been hired by the hospital. The complaint was passed on and a brief investigation conducted.

Erdmann countered by claiming that Mendoza consented to the conduct and participated in mutual sexually based interactions with him. Erdmann claimed that he was a reluctant participant to the sexual conduct initiated by Mendoza.

In the end, the hospital terminated both employees for engaging in inappropriate and unprofessional behavior. Mendoza sued, claiming he was retaliated against for bringing a claim of harassment.

Importantly the court took pains to point out the importance of a good faith investigation and that lack of a proper investigation can be evidence of retaliatory motive: "The lack of a rigorous investigation by defendants is evidence suggesting that defendants did not value the discovery of the truth so much as a way to clean up the mess that was uncovered when Mendoza made his complaint."

Mendoza's expert testified to numerous shortcomings in the investigation:

- Lack of a formal investigation plan.
- Lack of promptness.
- Interviewing the complainant (Mendoza) and the accused (Erdmann) at the same time rather than separately.

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[80] *Steele v. Youthful Offender Parole Board*, 162 Cal. App. 4th 1241 (2008)

[81] *Mendoza v. Western Medical Center Santa Ana*, 222 Cal.App.4th 1334 (2014)

- Not interviewing any other individuals, such as co-workers, who might provide insights into either party's credibility or conduct.
- Not using an impartial, trained investigator or human resources employee to conduct the investigation.

A "more thorough investigation might have disclosed additional character and credibility evidence for defendants to consider before making their decision," according to the court. Instead, the court noted, the hospital fired an excellent, long-term employee soon after the employee reported harassment by a recent hire. The court, in a sharply worded footnote, pointed out that just because the accused and the complainant offer conflicting accounts does not relieve the employer of the responsibility to make a good faith decision.

Select the Investigator

Determining who should conduct the investigation is a critical part of the planning process. Consider the following issues:

- Is the complainant comfortable with the investigator? Is he/she more comfortable with a male or female investigator?
- Is the investigator the right person to handle the investigation?
- Does the investigator possess the experience and expertise to conduct this particular type of investigation?
- Can the investigator display objectivity?
- Does the investigator have any bias that will affect the outcome of the investigation?
- If an outside investigator is used, is the investigator a licensed attorney or a licensed private investigator as required under state law?

Take Interim Action Pending the Investigation's Outcome

When you first learn of a complaint, determine if you must take any interim actions before you initiate an investigation. Make a similar determination after the initial interviews are complete. You may need to take steps to protect the health and safety of other employees or to protect the integrity of the company's policies or guidelines.

Some situations may warrant placing the accused employee on a leave of absence while an investigation is in process. If you suspect an employee of ongoing conduct that is harmful to the company, place the individual on leave pending the investigation's completion. The leave of absence can be with or without pay, depending on the severity of the allegations and the employee's status as exempt or nonexempt. Give the employee a leave of absence notice at the time you inform him/her of the leave. You can use the *Leave of Absence Notification with Pay* form. If you use your own notice, it should include the following information:

- The name of the employee who is being investigated
- A statement explaining that the employee is to be on leave with or without pay
- An estimate of the investigation's duration
- Who to contact if the employee has any questions or concerns about what is expected during the leave or about any part of the investigation
- Any expectations you may have of the employee during the leave and investigation, such as:

  - Full cooperation throughout the investigation and complete honesty when answering questions and providing information to the company
  - All information and documentation relevant to the investigation
  - The employee's full commitment to help bring this matter to closure, including meeting during normal working hours to provide information to the company
  - A commitment to not taking any actions that would impede or interfere with the investigation.
  - An explanation of how the company will handle the employee's return to work

Leaves of absence with pay do not require any payroll action. If a leave of absence without pay occurs, contact your payroll representative for instructions on appropriate payroll procedures.

Leave of Absence Notification with Pay

Determine Whom to Interview and in What Order

In most situation, you will usually interview the complainant first. Then, you will usually interview the alleged harasser. You may not need further investigation if the alleged harasser admits to the allegations. Finally, interview any witnesses that either party requests to be interviewed. You may need to re-interview the complainant or the accused, depending on what is learned during your interviews. Follow up to close any loopholes.

Other interviewees in a sexual harassment investigation include:

- Incident observers
- Anyone with relevant information
- Authors of relevant documents

Take Accurate Notes

Accurate note taking in a sexual harassment investigation is critical. However, the investigator must be able to establish a rapport with the witness and assess his/her credibility. The investigator should assess the best means to take notes and maintain this rapport.

Take factual notes throughout the investigation. Factual notes will help determine what actually happened and will help you reach an effective resolution. Do not include your interpretations, beliefs, feelings, frustrations, opinions or assumptions about what you hear or see. If you have a question about an employee's behavior, ask for an explanation and note the response.

Observe and record the employee's demeanor and behavior without drawing your own conclusions about why this behavior is occurring. These observations may later help you evaluate credibility.

> The following note contains facts as well as interpretations: *I asked [person interviewed] if she had ever touched any of her employees. She nervously said "No." I think she was lying.*
>
> This note records only the facts and describes what occurred: *I spoke with [person interviewed] in my office from approximately 3:00 p.m. to 3:05 p.m. on October 7, 2016. Her manager was also present. I asked [person interviewed] if she had ever touched any of her employees. She said "No." She did not look at*

me or her manager directly when she said no, and she moved around in her chair. I then asked why she was fidgeting and not looking at us. She would not reply.

Make sure that your notes are legible and provide enough information to understand what occurred or what was said. Proper punctuation and complete sentences are not necessary. Also document if information is firsthand knowledge, gossip or hearsay.

Keep investigation notes in a separate place from notes about other employee or business issues. Keep notes about different employees on separate pieces of paper. Make sure to document the date and beginning and ending time of the interview. Do not record notes in bound notebooks or other formats that might contain information outside of the particular investigation. If the investigation reaches litigation, you might be required to share your entire notebook publicly, including notes that are not relevant to the case.

Interview the Complainant

At this point in the sexual harassment investigation, you are ready to begin your formal, initial interview with the person who is raising the complaint. The most important objective of this initial interview is to gather the facts of the situation.

Review the *Sexual Harassment Investigation Checklist* to help you gather enough facts about the complaint.

Sexual Harassment Investigation Checklist

The first meeting with the complainant sets the tone for the investigation, including its resolution. You can use the *Harassment Investigation Interview Guidelines* to help you with the interview.

Harassment Investigation Interview Guidelines

After you learn the general nature of the complaint, make sure that the employee feels comfortable that you can be objective in addressing the matter. Remember, the role of an investigator is that of a fact finder. You must be unbiased. Follow these guidelines to try to limit the amount of stress a complainant might feel during the interview:

- Arrange for a private but comfortable setting. If your office is in a highly visible location, you may want to arrange after-hours interviews.
- Provide ample time and opportunity to gather the facts. The investigation may be very difficult for the complainant. Emphasize that the employee can take as much time as necessary and come back if he/she recalls other facts later.
- Thank the complainant for bringing the matter to the company's attention. Encourage the employee to speak freely and make all complaints known to you. Re-state the company's policy against sexual harassment and the procedure to resolve complaints in-house.
- Ask the complainant for any information supporting the complaint; detailed facts, witnesses, documents or any other evidence.
- Reassure the complainant that the company will not permit any form of retaliation for bringing the complaint. Ask the complainant to report any retaliation to you immediately. Retaliation includes further harassment, failure to promote or give performance increases, transfers and similar actions.

- Instruct the complainant not to take any actions that would impede or interfere with the investigation.
  - Blanket rules prohibiting employee discussions of ongoing investigations may violate labor law rights that apply to both union and non-union employers. The need for confidentiality during the investigation should be examined on a case-by-case basis and take into account legitimate business factors such as concerns regarding destruction of evidence and the type of investigation (violence or theft, for instance). For more information, see "Employer Investigations" in Chapter 31, page 951.
- Inform the complainant that you will disclose information on the complaint and investigation only on a need-to-know basis.
- Ask the complainant if he/she has any suggestions for the best way to resolve the matter. Stress that you may not follow these suggestions, but you will take them into consideration.

Develop a standard way to close the interview. The closing should include the following:

- Ask the complainant if there is anyone else with whom he/she would like you to speak to corroborate his/her allegations.
- Ask the complainant if he/she has told you about each and every harassment allegation.
- Prepare the complainant's statement at the time of the interview, if possible. Most often, the information is too voluminous and detailed to prepare a statement immediately. In that case, tell the complainant that you will prepare a statement, give him/her an opportunity to review and revise it and then arrange for the document to be signed.
- Tell the complainant to inform you of any information that he/she may have forgotten to mention or of any new information.
- Answer any questions that the complainant may have.
- Explain what will happen during the investigation from this point on. In most cases, it would be appropriate to share only the broad outlines of any future activity, such as, "I will be speaking to other people to reach a determination."
- Encourage the complainant to inform you immediately if he/she experiences any retaliation due to the complaint or resulting investigation. Remind him/her that you will not tolerate retaliation. A good investigator will ensure that the employer follows up with the complainant periodically during and after the investigation to make sure that retaliation does not occur.

Following the interview, make your own notes to record your observations of the interview and the complainant's credibility.

Harassment Investigation Credibility Assessment Guidelines

Interview the Alleged Harasser

A good investigator never forgets that everyone is innocent until proven guilty. The alleged harasser must be treated fairly throughout the investigation. He/she deserves to know exactly what the allegations are and to be given the opportunity to fully respond. At the outset state that you are investigating a complaint of workplace misconduct at the employer's request. Prepare the questions you will ask in advance.

You can use the *Harassment Investigation Interview Guidelines* to help you with this interview.

Harassment Investigation Interview Guidelines

Begin by reviewing the allegations in their entirety. Give the alleged harasser an opportunity to respond to each and every allegation. Give him/her the opportunity to tell his/her side of the story before you ask about the specifics.

Narrow your questioning by using the "who, what, where, when and how" method. If you begin with a narrow line of questioning, you will not receive the alleged harasser's emotional response to the allegations. Ask questions that provide chronological answers, such as, "Then what happened?" or "Where were you on x date at x time?" Ask your questions slowly and methodically. Do not continue until you feel the question has been answered.

Develop a standard way to close the interview. The closing should include the following:

- Tell the alleged harasser that he/she should not do anything to impede or interfere with the investigation.
- Ask the alleged harasser if there is anything else he/she wants you to know to successfully complete your interview.
- Inform the alleged harasser that you may need to speak with him/her again before you close the investigation.
- Reiterate the company policy against retaliation. Make sure that the alleged harasser understands that he/she cannot retaliate against the complainant and that no one else can retaliate against the alleged harasser.

Following the interview, record your observations about the interview and the alleged harasser's credibility.

Harassment Investigation Credibility Assessment Guidelines

Interview Other Witnesses

Be sensitive to the fact that being interviewed as part of an investigation can be quite stressful. Generally, the person who is conducting the investigation is aware of the big picture:

- You know what you are investigating.
- You have access to all of the information that the investigation uncovers.
- You know the part that each interviewee plays in the investigation.
- You know why the interviewee is being interviewed.

Usually, the interviewee does not know any of these things. The interviewee may be uncomfortable and want to know:

- If he/she is being investigated.
- How the information uncovered during the interview will be used.
- If the information will remain confidential.
- If the investigation will result in disciplinary action.

For the investigation to succeed, you need people to talk openly and candidly with you. Make an effort to put the interview subject at ease. Anticipate the questions or concerns that may come up and be prepared to address these questions or concerns honestly and forthrightly. Use the following guidelines to help you conduct successful interviews.

1. Prepare an opening statement.

   "I appreciate your time today. I have asked you here to discuss a sexual harassment claim. You have been identified as someone who may have some information on the claim. This is a serious charge. The company is committed to investigating every claim of sexual harassment. In keeping with our commitment to our employees, I will keep the information that you provide as confidential as possible. No one will hear what you say to me unless, as a part of the investigation, they have a need to know."

   "The company also wants its employees to come forward if they witness sexual harassment. It is the company's policy that no disciplinary or other negative action will be taken against you for assisting in this investigation."

2. Stress that a conclusion has not been reached. All too often, an interviewee feels that you have already made up your mind and are merely going through the motions to create the appearance of fairness. Stress that when complaints are raised, it is the organization's obligation to investigate. No conclusions will be made until all the facts are gathered and analyzed.

3. When speaking with witnesses, provide them with only the information necessary for your investigation.

4. Discuss information security. Emphasize that you will only disseminate information as appropriate and only on a need to know basis. Additionally, stress that the witness should not do anything to impede or interfere with the investigation.

5. Diffuse any attempt at retaliation. Inform the interviewee that it is your company's policy to foster an environment in which employees feel comfortable raising complaints. Explain that you will not tolerate any form of retaliation or reprisals against investigation participants. Any participant who intentionally misdirects an investigation, whether by falsehoods or omissions, will be subject to discipline, up to and including immediate discharge.

6. When interviewing a witness, use the *Harassment Investigation Interview Guidelines* to structure your interview. As you did with the complainant and the alleged harasser, go through the events chronologically and ask for any information the witness has to corroborate or refute what you have been told. As previously stated, divulge only enough information as necessary to learn what information this witness has to offer. You do not always need to review the entire complaint. You only need to review the allegations relevant to this witness's involvement. It may be necessary to ask the witness if he/she is aware of any workplace misconduct by the alleged harasser and whether the complainant harbors any bias against the alleged harasser.

7. Develop a standard "close" to the interview. This should include:

   - Telling the witness that he/she cannot do anything to impede with or interfere with the scope of the investigation;
   - Preparing an affidavit of the witness' statement at this time if possible. If this is not possible, inform him/her of your intent to do so and explain that he/she will have an opportunity to review and revise it before the document is signed;
   - Asking the witness whether there is anything else he/she wants you to know to successfully complete your interview; and

- Informing the witness that you may need to speak with him/her again before you close your investigation.

8. Following each interview, record your observations of the interview and the credibility of the witness.

Harassment Investigation Credibility Assessment Guidelines

Harassment Investigation Interview Guidelines

Conduct Follow-Up Interviews

You may need to interview the complainant and/or the alleged harasser again at the end of the process. You may learn that the complainant just broke off a relationship with the alleged harasser and her co-workers referred to her as a "jilted lover." Or, you may have concluded that the complaint is based on fact and that the alleged harasser's story is unfounded. If follow-up interviews are necessary, follow these steps:

1. Discuss what you have learned with the individual. If you see a pattern, give quotes as to what you learned from the witnesses.

   [To the complainant] I spoke to the employees who were identified as witnesses, and I was told you are "out to get" the alleged harasser because he jilted you.

   [To the alleged harasser] The witnesses I've spoken to confirmed that you repeatedly "tell dirty jokes," touch the opposite sex inappropriately and have a "history of propositioning" new hires.

2. Invite the individual to respond.

3. Ask the individual if there is anyone else with whom he/she would like you to speak before you close the investigation.

4. Write any new information in a properly signed statement.

Resolving Sexual Harassment Complaints

When analyzing facts, very few issues are black and white. You must apply logic to reach a conclusion. Unless the subject of an investigation admits to harassment, you must examine the relevant facts based on the foundation of your experience.

As a general rule, if you have conducted a fair and impartial investigation, the courts will not interfere with your decision to resolve the complaint.

Examine the Objective Facts

To determine what actually happened, examine the objective facts to reach a logical conclusion. Ask yourself:

- Did the person who is raising the complaint do so in a timely manner? If not, why not? Why was the complaint raised now?
- Did similar actions happen in the past that were not reported? If so, why were they not reported?
- What motivation would the complainant have to fabricate facts?

- What motivation would the alleged harasser have for denying the incident(s)?
- Did either the complainant or the alleged harasser say anything at any point that you subsequently found to be false?
- Is there a conflict in the accounts? Are there other facts that will help me resolve the conflict?

Why Someone Might Not Immediately Report Harassment

A sexual harassment victim might delay raising a complaint because he/she:

- Feels that he/she has less power than the harasser
- Fears retaliation and/or losing his/her job
- Is a single parent or the sole supporter of children
- Thinks he/she will not be believed
- Doesn't want to cause trouble
- Thinks that if he/she ignores the harassment, the problem will go away
- Is embarrassed and doesn't want publicity
- Thinks it is his/her fault (has misplaced feelings of guilt)
- Is uncertain about how and to whom to report sexual harassment
- Lacks trust in the investigation process or investigator(s)

Assess Credibility

In many cases, there may not be a corroborating witness. The investigation may come down to a he said/she said situation. This does not mean that the alleged conduct did not occur. Quite the contrary— sexual harassers do not usually invite an audience. A trained investigator must assess credibility. Pay attention to nonverbal clues such as body language, tone of voice, eye contact, reactions to allegations, sexual advances toward you and the selection of words, such as "girl" or "boy" instead of "woman" or "man." Ask yourself:

- Does any evidence exist to corroborate the complaint?
- Was the complainant's story consistent with the information that you learned from other witnesses?
- Did anyone change his/her story during the investigation?
- Did anyone add or withdraw an allegation?
- Does the story make sense?
- Is the story consistent and plausible?
- Are there any indications of bias, hostility or self-interest?

Many times credibility decisions are based on the trained investigator's best judgment. Do not be afraid to make credibility decisions. If you do, be sure you can back up the decisions with reasonable explanations.

Harassment Investigation Credibility Assessment Guidelines

Come to a Conclusion

After analyzing all of the facts, reviewing all the relevant documents and assessing credibility, the investigator must decide if the organization's anti-harassment policy has been violated. The investigator will come to one of the following conclusions:

- Company policy was violated.
- Company policy was not violated.
- The facts are too inconclusive to determine if company policy was violated.

The investigator should not state that the law has been violated. This is a legal conclusion that should be made only by competent legal counsel. Drawing legal conclusions falls outside the investigator's duties, even if the investigator is a lawyer.

Take Quick Corrective Action

After the investigation has concluded, move swiftly to assess if corrective action is necessary. If the investigation was lengthy, it may not be wise to wait for a written report. The investigator can orally brief you about the investigation process and results so you can decide on corrective action. To determine what corrective action to take, consider the following:

- Did some form of harassment occur? If so, would you consider it to be a serious offense? What did the company do in the past about similar violations?
- Do any federal, state or local harassment laws require you to take certain actions in this case?
- How long has the employee who violated your policy been employed at the company?
- Has the employee ever violated any other harassment policies in the past?
- What is the employee's performance history at the company?
- Do any other mitigating circumstances exist that could affect your recommendation?

After considering these factors, you are ready to determine the amount of discipline warranted. The action you choose must be appropriate for the severity of the conduct. Some disciplinary options include:

- No action
- Training for the harasser
- Verbal discussion and counseling
- Written warning
- Suspension, demotion, transfer or reduction in salary
- Termination

Different situations call for different actions. If the course of corrective action is not clear, you may want to consult legal counsel.

After you decide what to do, use the *Harassment Discipline Checklist* to make sure you cover all the issues.

Harassment Discipline Checklist

You may be liable for disclosing information on specific allegations and the resulting disciplinary measures to people within the company. Limit disclosure to only those with a business need to know.

Prepare an Investigation Summary

After the investigator collects and analyzes the facts and then draws conclusions, he/she should document the findings and conclusions in an investigation summary. This summary should include:

- The sequence and process followed from the time the complaint was raised, through the investigation to the final decision. Two or three paragraphs usually suffice.
- Only information that is relevant to the complaint.
- Only facts, not assumptions of intent. Facts are objective; assumptions of intent are not.
- The key facts that you used to make the final decision:
  - Interview(s) with the complainant.
  - Interview(s) with the alleged harasser(s).
  - Interviews with other employees who had information relevant to the investigation.
  - Any relevant supporting documentation.
- Your credibility assessment criteria, which states how the credibility of the individuals who supplied information was assessed. What did they say that the investigator believed and why? What was said that he/she did not believe and why?
- The conclusions. Refer to the company's guidelines or policies, not laws. Legal definitions are better suited to a court of law. Legal definitions usually involve several components, all of which must be present for a legal term to apply. To provide more clarity to the conclusion, refer instead to violations of guidelines or policies.

> "As a result of the investigation, we concluded that the alleged harasser did touch an employee, and that this touch was unwanted and offensive to the complainant."

After the investigator makes the final conclusions, he/she should describe any complaints that were not resolved in the investigation and why they were not resolved.

If the investigation was performed by an outside party, ensure that the third party communicates the investigation report only to you or your agent.

Communicate Investigation Results

When the investigation is over, communicate the results to both the complainant and alleged harasser.

Convey Results to the Alleged Harasser

After you complete the investigation, notify the alleged harasser of the results.

- Briefly explain the complaint(s) raised against the employee and the steps you took to investigate them.
- Explain how you reached the conclusions. Include any complaints that were not resolved in the investigation and why they were not resolved.

- Discuss the actions that you are taking as a result of the investigation. Encourage the employee to provide any relevant additional information that he/she may have.
- Close by letting the employee know whom to contact if he/she has questions or information in the future about this investigation.

Convey Results to the Complainant

All too often, employers forget to close the final loop of the investigation by sitting down with the complainant and informing him/her of the investigator's findings and recommendations. When you meet with the complainant to inform him/her of your conclusions, be sure to communicate the following information:

- The conclusion that you reached.
- Why you reached that conclusion.
- Any action that affects the complainant that will be taken as a result of your conclusion. If you decided that disciplinary action was required, do not divulge the nature of the action. Disciplinary action is confidential personnel information. Indicate that some action will be taken.
- What the employee should do if he/she experiences any retaliation.
- Whom to contact if he/she has questions or information in the future about this investigation.

Wrap Up the Investigation

After you explain the results of the investigation to all involved parties, you have completed a sexual harassment investigation. Follow through on all corrective actions. Keep all files and documentation in case of further litigation. Repeat the investigation process if employees raise any other serious harassment complaints within the workplace. To prevent further occurrences, train your employees as often as possible. Label the final investigation file as "Need to Know, Confidential."

Limit access to this file to only those with a legitimate business reason. The complainant and the alleged harasser do not have access to this file in the normal course of business. If litigation that relates to the complaint arises, the alleged harasser, the complainant and others will probably obtain access to the file. Do not release the information in the final investigation file to anyone outside the company except when required by law, such as in the course of a lawsuit brought by an employee.

Although the actual content of the final investigation file will vary depending on the particular circumstances of each investigation, the file should include only the following information:

- Written communication from the complainant
- Complaint confirmation to the complainant (see *Harassment Investigation Letter to Complainant*)
- Leave of absence notice (see *Leave of Absence Notification with Pay*)
- Investigation summary
- Results and notifications
- Notification to the alleged harasser (see *Harassment Investigation Letter to Alleged Harasser*)
- Memo to the file regarding retaliation
- Notification to the complainant after the investigation
- Notification to the alleged harasser after the investigation

- Notes and supporting documentation as necessary to support key facts or conclusions in the investigation summary
- Written or electronic communications about the investigation to others, which may be important to demonstrate the steps taken during the investigation

Place only the final copies of documents in the final investigation file. Do not include drafts of the documentation.

Review HR and/or line management working files and notes to determine what to place in the final investigation file. Do not destroy any documents without the advice of legal counsel.

Employer Not Liable for Good Faith Investigation

In *Cotran v. Rollins Hudig Hall International Inc.,*[82] the California Supreme Court held that an employer must act in good faith and conduct an appropriate investigation into sexual harassment allegations. If the employer had reasonable grounds to believe that the employee engaged in sexual harassment at the time it made the termination decision, then the termination for sexual harassment is not wrongful.

Harassment Discipline Checklist

In this case, two female employees reported having been harassed by a supervisor named Cotran. The company informed Cotran that an investigation would be conducted, explained the process and asked for any witnesses he wished to have interviewed. Cotran was suspended for the two weeks of the investigation.

All witnesses identified by the subjects of the harassment and by Cotran were interviewed. The investigator concluded that it was more likely than not that sexual harassment had occurred and Cotran was terminated.

The trial court instructed the jury that the employer could terminate Cotran only if Cotran *actually* engaged in sexual harassment.

The California Supreme Court reviewed the case to clarify the standard that juries should use to evaluate an employer's just cause defense in wrongful termination cases. According to the court, the correct question for the jury is: Did the employer terminate the employee based on facts that were reached honestly or in good faith after an appropriate investigation, for reasons that were not arbitrary or pretextual?

The court did not determine what constitutes an adequate investigation. That must be determined in each case.

The *Cotran* decision reinforces the need for trained investigators and for conducting an immediate and reasonable investigation when an employee is accused of sexual harassment. Employees who have been terminated for engaging in sexual harassment often file wrongful termination claims. Employers can defend against wrongful termination cases if they conduct a reasonable investigation.

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[82] *Cotran v. Rollins Hudig Hall International, Inc.*, 17 Cal. 4th 93 (1998)

Chapter 28

Disabilities in the Workplace

The Americans with Disabilities Act (ADA) and the Fair Employment and Housing Act (FEHA) prohibit discrimination against people with disabilities and requires businesses to consider applicants and employees with disabilities as productive members of the workforce. This chapter describes the obligation to consider people with disabilities for employment on an equal basis and to prevent discrimination against them. This chapter includes information on required postings, harassment and retaliation protections, ADA enforcement and remedies for discrimination and employer obligations to consider qualified disabled individuals for employment and advancement.

This chapter explores disabilities as defined by the ADA, the more expansive California FEHA, and amended state regulations. This chapter discusses what you can and cannot do when considering an applicant with a disability. It then educates you on the obligation to provide reasonable accommodation for applicants and employees with disabilities. You must understand essential job functions and the interactive process of discovering what accommodations are considered reasonable.

The remainder of this chapter focuses on the rights and obligations of California employers under both laws.

Some of the content from this chapter was taken or adapted from Enforcement Guidance documents prepared by the federal Equal Employment Opportunity Commission (EEOC).

Laws Protecting Employees With Disabilities

Several state and federal laws protect employees with disabilities against discrimination. Employers must consider people with disabilities, both applicants and employees, as productive members of the workforce.

ADA and FEHA

Four state and federal laws protect employees with disabilities from discrimination: The Americans with Disabilities Act; the Americans with Disabilities Act Amendments Act of 2008; the Rehabilitation Act of 1973; and the Fair Employment and Housing Act, including regulations amended in 2012.

California law also prohibits discrimination against a person based on a medical condition.[1] A medical condition includes any health impairment that is related to or associated with a diagnosis of cancer, a record or history of cancer and an individual's genetic characteristics.[2] Federal and state law both prohibit discrimination based on genetic information.

Employers should take note that the EEOC has been particularly active with respect to pursuing disability discrimination claims.

The EEOC's Strategic Enforcement Plan sets the agency's national priorities for fiscal years 2013-2016. As part of that plan, the agency said it will focus on what it calls "emerging and developing" issues, which includes enforcing the Americans with Disabilities Act (ADA) and issues relating to coverage, reasonable accommodation, qualification standards, undue hardship and the direct threat defense.

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[1] Govt. Code sec. 12940(a)(2)

[2] Govt. Code sec. 12926(h)

Federal — Americans with Disabilities Act (ADA)

The ADA prohibits employers of 15 or more employees from discriminating against qualified individuals with disabilities. The ADA also requires an employer to provide reasonable accommodation for a qualified applicant's or employee's known disability, unless it would impose undue hardship on the employer's business, or unless the applicant or employee would cause a direct safety threat to others. The ADA also states that no person can be discriminated against or prevented from equal enjoyment of goods, services, facilities and accommodations of any place that serves the public because he/she is disabled. This includes hotels, restaurants, theaters, retail sales service establishments and any other place of employment or public access. The ADA requires these places to be physically accessible to people with disabilities.[3]

Federal — Americans with Disabilities Act Amendments Act of 2008 (ADAAA)

The ADAAA made changes to the definition of "disability" and rejected several U.S. Supreme Court decisions and portions of the EEOC's ADA regulations. The changes were designed to make it easier for an individual who brings ADA claims to establish a disability.

The ADAAA clearly stated that under federal law, the definition of "disability" will be construed in favor of broad coverage.

The amended ADA regulations also require:

- Nondiscrimination on the basis of disability in state and local government services (Title II).
- Nondiscrimination on the basis of disability by public accommodations and in commercial facilities (Title III).
- Service animals limited to dogs and miniature horses. Emotional support animals are not considered service animals.

Federal — Rehabilitation Act of 1973

The Rehabilitation Act of 1973 covers employers with federal government contracts of $2,500 or more. It also covers employers who receive federal financial assistance. The Rehabilitation Act of 1973 is similar to the ADA.[4] For more information, see "Affirmative Action and Federal Contractors and Subcontractors" in Chapter 26, page 777.

California — Fair Employment and Housing Act (FEHA)

FEHA covers employers of five or more employees and requires employers to reasonably accommodate people with disabilities. FEHA provides greater protection from disability discrimination than the ADA. For example, under FEHA, a person is considered disabled if he/she is "limited" in one or more of the major life activities, rather than "substantially limited" in those activities as required under the ADA.[5]

AIDS and HIV-positive status are considered protected disabilities under the federal ADA and state FEHA.[6]

Private membership clubs (other than labor organizations) exempt from taxation by the Internal Revenue Code (IRC) section 501(c) also enjoy an exemption from the ADA. However, such organizations are not exempt from the disability discrimination provisions of FEHA, unless they are religious, nonprofit organizations.

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[3] [illegible]

[4] [illegible]

[5] Govt. Code sec. 12926, 12940

[6] 29 U.S.C. secs. 793, 794; Govt. Code sec. 12940; Health and Safety Code sec. 120980

California treats AIDS and HIV-positive status as a disability. Individuals with AIDS and HIV-positive status are protected. In addition, these individuals can sue based on other forms of employment discrimination, invasion of privacy, defamation and AIDS-specific statutes that provide employees with legal recourse.[7]

California — Amended Disability Regulations

California's Fair Employment and Housing Commission adopted Modified Amended Disability Regulations (Amended Disability Regulations). The regulations, adopted in late 2012, significantly changed disability law in California, expanding the definition of disabilities in California and clarifying employers' obligations to reasonably accommodate qualified individuals.

California's disability regulations prohibit discrimination based on perceived disabilities or perceived potential disabilities. The regulations also require accommodation for the residual effects of disabilities[8] and provide guidance regarding the interactive process and medical documentation.

Proving Discrimination

The ADA requires employees to prove that they are "qualified individuals" and that they can perform the essential job duties before they can establish discrimination.

When FEHA was enacted, it did not specifically refer to "qualified individuals." In *Green v. State of California*, the California Supreme Court clarified that even though this phrase is not specifically used, FEHA still requires employees to prove that they are "qualified individuals" just like the federal ADA requires. The court also clarified that FEHA places the burden on an employee to prove that he/she is a qualified individual and not on the employer to establish that the employee is not qualified.[9]

Although FEHA does not specifically refer to a "qualified individual," California's disability regulations do. A qualified individual is an applicant or employee who has the required skill, experience, education or other job-related requirements of the position, and who can perform the essential functions of the position either with or without reasonable accommodation.[10]

Employers must defend their actions only after their employees can prove themselves qualified. An employee cannot show that an employer has done anything wrong until he/she can show that he/she was able to do the job with or without reasonable accommodation. California's disability regulations place the burden of proving qualification for the position on the applicant or employee.[11]

Once the employee has demonstrated that he or she is qualified to perform the job, he or she can prove discrimination if a preponderance of the evidence demonstrates a causal connection between a disability and the denial of an employment benefit. The disability does not need to be the sole or even dominant cause of the adverse action — if it was one of the factors that the employer considered, and the employer's action was not justified by an appropriate defense, the employee may be able to prove discrimination.

FEHA does not impose liability on employers if an employee cannot perform his duties with or without reasonable accommodation. "To do so would defy logic and establish poor public policy in employment matters," the Supreme Court, in *Green*, said.

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[7] Health and Safety Code sec. 120980

[8] 2 CCR sec. 11065 (d)(6), 7293.9(g)

[9] *Green v. State of California*, 42 Cal. 4th 254 (2007)

[10] 2 CCR sec. 11065(o)

[11] 2 CCR sec. 11066(a)

Discrimination on the Basis of Genetic Characteristics or Genetic Information

California law also prohibits discrimination based on a person's genetic characteristics.[12] A genetic characteristic means either of the following:

- Any scientifically or medically identifiable gene, chromosome or a combination or alteration thereof, or inherited characteristics that are:
  - Known to cause a disease or disorder in a person or his/her offspring.
  - Determined to be associated with a statistically increased risk of developing a disease or disorder.
  - Not presently associated with any symptoms of any disease or disorder.
- Inherited characteristics that may derive from the individual or family member that are:
  - Known to be a cause of a disease or disorder in a person or his/her offspring.
  - Determined to be associated with a statistically increased risk of development of a disease or disorder.
  - Not presently associated with any symptoms of any disease or disorder.

In addition, if you are covered by FEHA, you cannot directly or indirectly subject an employee, applicant or any other person to a test for the presence of a genetic characteristic.[13]

Genetic Information Discrimination Prohibited

Federal law under Title I of the Genetic Information Nondiscrimination Act of 2008 (GINA) includes provisions that generally prohibit group health plans and health insurance issuers from discriminating based on genetic information. Under Title II of GINA, it is illegal to discriminate against employees or applicants because of genetic information. Title II of GINA prohibits using genetic information to make employment decisions, restricts employers and other entities from obtaining genetic information and strictly limits disclosing genetic information.

If you are concerned about how this federal law may impact your organization — especially if you maintain offices outside of California — contact legal counsel.

The Departments of Labor, Health and Human Services and the Treasury are responsible for issuing regulations for Title I of GINA, which addresses the use of genetic information in health insurance. The EEOC enforces Title II of GINA, which addresses genetic discrimination in employment. For more information on GINA, see "Genetic Information Nondiscrimination Act (GINA)" in Chapter 8, page 135. If you are concerned about the impact of this law on your company, contact legal counsel.

The EEOC's "Equal Employment Opportunity is the Law" poster reflects current federal employment discrimination law, including the ADAAA. The poster contains information on GINA, which became effective in 2009. The current poster also includes updates from the Department of Labor.

California legislation clarified the extent of the protection for genetic information in California. The Legislature noted that the range of protection provided by the federal GINA is not complete for California. The legislation:

- Amended the Fair Employment and Housing Act (FEHA) (Govt. Code section 12940) to state that employers are prohibited from discriminating against employees on the basis of genetic information

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[12] Govt. Code sec. 12926(h)(2)

[13] Govt. Code sec. 12940(0) ;2 CCR sec. 11062(c

- Amended the Unruh Civil Rights Act, which generally prohibits business establishments from discriminating on specified bases, to include genetic information as one protected basis
- Expanded the bases upon which a health facility may not discriminate in the provision of emergency services

Under the state law, genetic information means information about any of the following:

- The individual's genetic tests
- The genetic tests of family members of the individual
- The manifestation of a disease or disorder in family members of the individual

Genetic information includes: any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.

Genetic information does not include information about the sex or age of any individual.

This prohibition against discrimination on the basis of genetic information is in addition to the existing state law prohibition against discrimination based on a medical condition, including genetic characteristic.

Drugs and Alcohol

Applicants or employees who currently use illegal drugs or abuse alcohol are not protected under the ADA or FEHA.[14]

You can terminate, discipline or refuse to hire any individual who currently uses controlled substances or who is addicted to them. You can do so regardless of whether the use has any effect on job performance. Taking any of these actions does not violate the discrimination provisions of the ADA or FEHA.

Under the ADA or FEHA, a test to determine if an employee is using illegal drugs or abusing alcohol is not considered a medical examination. You can conduct drug tests that are designed to accurately identify illegal drugs even before a job offer is made. For more information, see "When Drug Testing May Be Permitted" in Chapter 9, page 204.

However, the ADA and FEHA protect individuals who have successfully completed a supervised drug or alcohol rehabilitation program and no longer use illegal drugs or abuse alcohol. They also protect individuals who are erroneously regarded as using illegal drugs or abusing alcohol.

Additionally, illegal use of drugs does not include the use of drugs taken under the supervision of a licensed health care professional. To ensure that this requirement is met, give the employee an opportunity to discuss and explain test results.

Adopting and administering reasonable policies to prevent drug use, possession, or sale in the workplace does not violate the ADA or FEHA.

For more information, see "Drug or Alcohol Rehabilitation" in Chapter 9, page 208.

Protection for Recovered Drug and Alcohol Abusers

While current users are not protected, recovered drug and alcohol abusers may be covered under certain circumstances. The ADA and FEHA protect people who meet all of the following criteria:

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[14] *Collings v. Longview Fibre Co.*, 63 F.3d 828 (9th Cir. 1995)

- Formerly abused alcohol or illegal drugs
- Successfully rehabilitated themselves, either through a supervised rehabilitation program or through their own program
- No longer use illegal drugs

This protection extends to individuals participating in a drug or alcohol rehabilitation program.

Past illegal drug use may warrant exclusion from employment in specific occupations, such as police officers, or where the employer can demonstrate a direct threat to the health and safety of the individual or others. Any decision to take action based on prior illegal drug use should only be made after consulting an attorney.

Questions about past addiction to illegal drugs or participation in a rehabilitation program are considered "disability-related inquiries."[15] An employer may only make disability-related inquiries if they are job-related and consistent with business necessity.

Although individuals with a record of drug use who have successfully completed a rehabilitation program and no longer use illegal drugs may be protected, unacceptable addiction-related misconduct that violates company policy or performance standards is not protected under the ADA.

In *Hernandez v. Hughes Missile Systems*, the Ninth Circuit Court of Appeals decided that a blanket refusal to rehire any employee terminated for violating company policy violated the ADA. The court stated that the blanket refusal would exclude a former employee who had recovered from drug and alcohol dependencies.

However, the U.S. Supreme Court reversed the Ninth Circuit Court of Appeals decision.[16] The U.S. Supreme Court focused on the important difference between two legal theories — "disparate treatment" and "disparate impact." Hernandez's lawsuit relied on both.

In arguing disparate *treatment*, the employee claimed the company treated him less favorably than other applicants because of his real or perceived disability.

In arguing disparate *impact*, the issue was whether the rule against rehiring previously discharged employees discriminates against the protected class of recovered substance abusers in a way not justified by business necessity.

The disparate treatment claim was rejected because the no-rehire rule had a legitimate non-discriminatory basis. It is legitimate for a business to refuse to rehire an employee terminated for violating workplace conduct rules. However, the U.S. Supreme Court sent the case back to the Ninth Circuit Court of Appeals to determine if a "disparate impact" existed. Upon remand, the Ninth Circuit Court of Appeals reversed the trial court's decision, finding there was a material fact as to whether the decision not to re-hire Hernandez was based on his status as a substance abuser rather than a policy that prohibited rehiring violators of workplace conduct rules.[17]

In *Lopez v. Pacific Maritime Association*, the Ninth Circuit ruled that employers can have a "one-strike" rule that permanently disqualifies an applicant from future employment who fails a drug test, even once.[18] The court held that such a rule does not violate the ADA or state law prohibitions against disability discrimination. The applicant failed the company's drug test that is mandatory for all job seekers. The company had a one-strike rule — fail the test and you can never work at the company. After being rejected for employment, the applicant entered a rehabilitation program and then reapplied while still in the rehab program. The company rejected the applicant citing the one-strike rule. The court upheld the employer's decision because the one-strike rule eliminated all candidates who tested positive and there was no evidence of a disparate impact — that the rule disproportionately screened out recovering drug addicts.

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[15] [illegible]
[16] [illegible]
[17] [illegible]
[18] [illegible]

Questions about an employee or applicant's past use of illegal drugs or participation in a rehabilitation program are disability-related inquiries.[19] See "Disability-Related Inquiries" on page 863 for discussion of disability-related inquiries prior to or during employment.

Employers that want to adopt drug testing policies that eliminate and permanently ban candidates who fail pre-employment drug screening are advised to ensure that these policies are drafted in consultation with counsel and consistently enforced.

Recent Drug and Alcohol Abuse Not Protected by the ADA

The ADA does not protect employees who are participating in drug or alcohol rehabilitation programs unless they successfully refrain from drug or alcohol use for a significant period of time.[20]

In *Brown v. Lucky Stores, Inc.*, Karen Brown, a checker at a Lucky grocery store in California, was arrested and jailed for driving under the influence of alcohol and methamphetamine. Brown missed the next two days of work while in jail and the following day while attending a court-ordered drug and alcohol rehabilitation program. Lucky terminated Brown for job abandonment.

Brown argued that the ADA protects an employee who participates in a supervised rehabilitation program and no longer uses alcohol or illegal drugs. She claimed that after she entered the rehabilitation program, she no longer used alcohol or drugs and Lucky should have accommodated her by providing a leave of absence.

The Ninth Circuit Court of Appeals rejected Brown's argument, citing a congressional report that was prepared when the ADA passed, which stated, "employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem."[21]

Allowed Drug and Alcohol Policies

You may have an employment policy in accordance with the Drug-Free Workplace Act that prohibits employees from being under the influence of drugs or alcohol while in the workplace without violating the ADA or FEHA. You can require your employees who have drug or alcohol dependencies to maintain the same job performance standards as other employees. You have the right to discipline or terminate employees for lack of job performance, tardiness, excessive absences, workplace accidents, etc.

Medical Marijuana Use Not Protected by the ADA or FEHA

You have the right to enforce a drug-free policy in your workforce, even though medical marijuana use is permitted under state law.

In *Ross v. Ragingwire Telecommunications, Inc.*, an employer received the results of an employment drug test and, after eight days of employment, discharged an employee for marijuana use. The employee sued for wrongful termination, employment discrimination and breach of contract. He alleged that he was permitted to use marijuana under his physician's prescription for chronic back pain, pursuant to the California Compassionate Use Act of 1996.

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[19] 2 CCR sec. 11071(d)(2)(A)

[20] *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182 (9th Cir. 2001)

[21] H.R. Conf. Rep. No. 101-596, at 64 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 565, 573

Because of his condition, Ross was considered a qualified individual with a disability under FEHA. After RagingWire Telecommunications, Inc., offered Ross a job as a lead systems administrator, it required him to take a drug test as a condition of employment. Ross tested positive for marijuana. RagingWire reviewed Ross's documentation about his prescription marijuana use but fired him because he failed the drug test.

Ross claimed his disability and use of marijuana to treat pain does not affect his ability to perform the essential functions of the job for which he was hired. Thus, Ross claimed that RagingWire violated FEHA because the company failed to make a reasonable accommodation for his disability. Ross was essentially asking RagingWire to accommodate his marijuana use at home by waiving its policy requiring a negative drug test of new employees. Ross claimed that his marijuana use is akin to the use of insulin or other prescription medications that are legal under California law. RagingWire countered that it terminated Ross based on its policy to deny employment to people who test positive for illegal drugs.

The California Supreme Court upheld the termination. According to the court, the Compassionate Use Act did not give marijuana the same legal status of other legal prescription drugs because marijuana is still an illegal drug under federal law. Further, the Act only specifies that users of marijuana under the Act are only exempted from criminal liability. Indeed, FEHA does not require employers to accommodate the use of illegal drugs nor does the Act address the issue as it impacts California employers. If the Legislature intended the Act to impact employer rights, legislators would have stated this in the law. The Legislature has not.[22]

In *James v. City of Costa Mesa*, a case involving medical marijuana and the ADA, the Ninth Circuit Court of Appeals reached a similar conclusion.

The ADA excludes individuals who are currently using illegal drugs from the definition of "disability." In *James*, the Ninth Circuit ruled that the definition of "illegality" is linked to federal, not state law. Though state law exempts users of prescription medical marijuana from criminal prosecutions, federal law classifies any marijuana use as "illegal" under the federal Controlled Substances Act.

The Ninth Circuit ruled that because federal law does not authorize marijuana use, current users are not entitled to the protection from discrimination under the ADA.[23]

The case involved Title II of the ADA, which prohibits discrimination against the disabled in the provision of public services. The lawsuit alleged that attempts by two cities to interfere with access to medical marijuana facilities violated Title II of the ADA.

Though the case does not involve the employment discrimination provisions found in Title I of the ADA, the definition of disability is the same in both Title I and Title II of the ADA. Thus, the *James* ruling would also likely apply to employment discrimination cases.

Drug Use at Work Not Protected by the ADA

Terminating an employee for engaging in the illegal use of drugs at work does not violate the ADA. In *Collings v. Longview Fibre Co.*, the Ninth Circuit Court of Appeals held that such a discharge is based on the employee's misconduct rather than any disability, such as drug addiction, that would otherwise be protected under the ADA.[24]

The Ninth Circuit Court of Appeals case clarifies that the ADA does not protect individuals who are currently using illegal drugs. You can terminate or deny employment to people who use drugs illegally. However, employees who have been rehabilitated successfully are protected under the ADA.

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[22] *Ross v. Ragingwire Telecommunications, Inc.*, 42 Cal. 4th 920 (2008)

[23] *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012)

[24] *Collings v. Longview Fibre Co.*, 63 F.3d 828 (9th Cir. 1995), cert. denied, 116 S.Ct. 711 (1996)

Thoroughly investigate any suspected illegal use of drugs before terminating those involved. An individual who was terminated after erroneously being perceived as a drug addict is likely to have a valid claim under the ADA and FEHA. Performance of a good-faith investigation may serve in your defense.

Workplace Injuries and Disability Discrimination

Workers' compensation coverage does not automatically establish that a person is protected by the ADA or FEHA. For more information, see Chapter 25, "Workers' Compensation."

You cannot refuse to allow an individual with a disability to return to work even if he/she is not fully recovered from a work-related injury, unless you can show that:

- The individual cannot perform the essential functions of the job with or without reasonable accommodation.
- The individual would pose a direct threat to himself/herself or others that could not be reasonably accommodated.

Neither the ADA nor FEHA require you to create "light duty" positions unless the "heavy duty" tasks are marginal job functions that you can reallocate to co-workers as part of the reasonable accommodation process. However, a past practice of creating light-duty positions may result in your obligation to offer this type of accommodation to an injured employee with a disability.

Employers must initiate a good faith, interactive process to identify a reasonable accommodation for a disabled employee returning from a workers compensation leave of absence.[25] See "Interactive Process for Reasonable Accommodations" on page 849 for more information on the interactive process.

The California Supreme Court opened the door to employees filing lawsuits alleging disability discrimination in cases where employees were previously limited to workers' compensation lawsuits. In *City of Moorpark v. The Superior Court of Ventura County,*[26] the California Supreme Court ruled that an employee who was not allowed to return to work after being out on a workers' compensation claim could file a disability discrimination claim under the state's FEHA. See "Employee Protection From Discrimination" in Chapter 25, page 697.

Disabilities and Employee Benefits

The ADA and FEHA prohibit you from denying equal benefits to qualified applicants or employees with disabilities, including discriminatory allocations of fringe benefits, even if you do not administer these benefits.[27] The ADA contains an equal access clause that prohibits employers from establishing policies that limit or segregate disabled people in any way. You cannot hire disabled individuals only for part-time positions while limiting benefits coverage to full-time employees. Pre-existing condition clauses can be included in organization health insurance policies, covered by HIPAA protections, if they are not a subterfuge to avoid the ADA.[28]

Mental Health and Substance-Abuse Treatment Protections

California offers limited legal protections providing for equal protection or parity relating to the treatment of mental and physical illnesses.

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[25] 2 CCR sec. 11069(b)(3)

[26] *City of Moorpark v. The Superior Court of Ventura County.* 18 Cal. 4th 1143 (1998)

[27] 29 CFR sec. 1630.4(f)

[28] 29 CFR sec. 1630.5

The federal Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) is a federal law that generally prevents group health plans and health insurance issuers that provide mental health or substance use disorder benefits from imposing less favorable benefit limitations on those benefits than on medical/surgical benefits. It requires financial parity in treatment and treatment limitations. The MHPAEA originally applied only to group health plans and group health insurance coverage. However, it was amended by the Patient Protection and Affordable Care Act to also apply to individual health insurance coverage. The MHPAEA applies to employers with 51 or more employers. More information can be found on the Department of Labor's website at www.dol.gov.

Temporary Workers and Disability Discrimination

The EEOC issued *Enforcement Guidance: Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms* to clarify how federal disability discrimination laws apply to temporary workers. The guidance covers people who are placed in jobs by staffing firms, such as employment agencies or contract firms. According to the EEOC, these workers often qualify as employees of both the staffing firm and the client. Therefore, both entities bear certain obligations to temporary workers under the ADA and the Rehabilitation Act.

According to the EEOC, the staffing firm or the client may be liable for discrimination if either the staffing firm or the client participates in the discrimination, knew about, or should have known about the discrimination and did not take corrective action.

A staffing firm or its client cannot ask disability-related questions or require medical examinations until after an employment offer is made. If a staffing firm places someone on its roster for future consideration for assignments, the listing is not an offer of employment. Disability-related questions and medical examinations are prohibited at that stage.

Required ADA/FEHA Posters

All employers, employment agencies, labor organizations and others covered by the ADA must post a notice in an accessible format to applicants, employees or members describing the applicable provisions of the ADA.[29] Those covered by California's FEHA must post the DFEH's discrimination poster (DFEH-162).

Both posters are available in the ***California and Federal Employment Notices Poster*** from CalChamber. To order, call (800) 331-8877, or visit store.calchamber.com.

Disability Defined

In California, a person is considered disabled if he/she exhibits one or more of the following characteristics:

- Has a physical or mental impairment that limits one or more of the major life activities[30]
- Has a record of an impairment[31]
- Is regarded as having an impairment[32]

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[29] 29 U.S.C. 105

[30] 42 U.S.C. 12102 (1)(A) and Govt. Code sec. 12926 (k)(1)(b)

[31] 42 U.S.C. 12102 (1)(B) and Govt. Code sec. 12926 (k)(1)(b)(3)

[32] 42 U.S.C. 12102 (1)(C) and Govt. Code sec. 12926 (k)(1)(b)(4)

- Is regarded or treated by the employer as having a condition that is not presently disabling but may become a physical disability[33]
- Has any health impairment that requires special education or related services[34]

The definition of "disability" in California includes:[35]

- Mental disabilities that limit a major life activity. Examples include:
    - Emotional or mental illnesses
    - Cognitive disabilities
    - Clinical depression
    - Bipolar disorder
    - Autism spectrum disorders
    - Schizophrenia
    - Post-traumatic stress disorder
    - Obsessive compulsive disorder
- Physical disabilities, including, but not limited to, having any anatomical loss, cosmetic disfigurement, or physiological disease, disorder or condition that does both of the following:[36]
    - Affects one or more of the following body systems: neurological; immunological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; circulatory; skin; and endocrine; and
    - Limits a major life activity.

  Examples of physical disabilities include:
    - Blindness
    - Deafness
    - Missing limbs
    - Mobility impairments
    - Cerebral palsy
    - Conditions such as HIV/AIDS, hepatitis, epilepsy, diabetes, multiple sclerosis and heart disease
- Special Education disabilities, such as significant difficulties in the use of listening, speaking, reading writing, reasoning or mathematical abilities.[37] Examples include:
    - Brain injury
    - Dyslexia
    - Developmental aphasia

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[33] 42 U.S.C. 12102 (3) and Govt. Code sec. 12926 (k)(1)(b)(5)

[34] Govt. Code sec. 12926 (k)(2)

[35] 2 CCR sec. 11064 (d)

[36] 2 CCR sec. 11065 (d)

[37] 2 CCR sec. 11065 (d)(3)

- A record or history of disability. This includes individuals who may not be currently disabled, but who previously suffered an impairment.[38]
- Perceived disabilities. Individuals may fall into this category if their employers regard them as having, or having had, any mental or physical condition that makes achievement of a major life activity difficult.[39]
- Perceived potential disabilities. Individuals may fall into this category if their employers regard them as having or having had a physical or mental condition that has no present disabling effect, but which may become a disability in the future.[40] For more information on perceived and perceived potential disabilities, see "'Record Of,' 'Regarded As' and 'Perceived As' Defined" on page 844.
- Medical conditions, including cancer-related impairments or genetic characteristics that put an individual at increased risk for disease or disorder.[41]

Employers are also prohibited under both FEHA and the ADA from discriminating against an employee because of his/her association with a person who has, or is perceived to have, a disability. For more information, please see "Disability Association Claims" on page 874.

California's disability regulations also define "disability" as any matter covered by ADA or the ADAAA that offers broader protection than California law.[42]

Correctable physical or mental impairments may be considered disabilities under FEHA and the ADA. For more information, see "Correctable Impairments May Be Disabilities" on page 845.

FEHA considers a person disabled if he/she is limited in one or more of the major life activities, rather than substantially limited in those activities, as defined by the ADA. Under FEHA, a mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity "difficult."

"Limits" and "Substantially Limits" Defined

California law under the FEHA has always taken an expansive view of the definition of "disability." Under FEHA, an individual need only be "limited" in performing a major life activity, not "substantially limited" as required under federal law. FEHA specifically states that definitions of physical and mental disabilities are to be broadly construed.[43] Under FEHA, a mental or psychological disorder or condition limits a major life activity if it makes the achievement of a major life activity "difficult."[44]

California's disability regulations clarify that determining whether a disorder makes a life activity "difficult" requires an individualized assessment. Employers should consider what most people in the general population or in an individual's peer group can perform with little or no difficulty, and compare that assessment to the employee's abilities.

Employers may, but are not required to, engage in scientific, medical, or statistical analysis. Employers should determine whether a condition "limits" a major life activity without regard to any mitigating measures such as assistive devices or medications (see "Correctable Impairments May Be Disabilities" on page 845).[45]

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[38] 2 CCR sec. 11065 (d)(4)

[39] 2 CCR sec. 11065 (d)(5)

[40] 2 CCR sec. 11065 (d)(6)

[41] 2 CCR sec. 11065 (d)(7)

[42] 2 CCR sec. 11065

[43] Govt. Code sec. 12926.1

[44] Govt. Code sec. 12926(i)(1)(A)

Federal court decisions since the original enactment of the ADA tended to narrow the coverage under the Act. In response, the ADAAA amendments were intended to expand the definition of disability under federal law and to direct courts to read the law expansively to find a covered disability. The standard under the ADAAA, as with FEHA, is generally pre-disposed toward finding coverage. The final rules state that the term "substantially limits" under federal law should be broadly construed in favor of expansive coverage.

The federal regulations also provide that:

- The determination requires an individualized assessment.
- The primary focus of the ADA is on whether discrimination occurred and the determination of "disability" should not require extensive analysis.

An impairment that is episodic or in remission is a disability under the ADAAA and California's disability regulations if it would substantially limit a major life activity when active.[46] Examples of episodic impairments include asthma, high blood pressure and bipolar disorder. An impairment such as cancer that is in remission but may possibly return in a substantially limiting form will also be a disability under the ADAAA.

Prior to the ADAAA, the U.S. Supreme Court held that an employee who was unable to perform certain specific manual tasks at work because of carpal tunnel syndrome did not qualify as a disabled person under the ADA. According to the Court, under the ADA, a disability did not "substantially limit" a major life activity if the employee's limitations did not prevent her from performing "... the variety of tasks central to most people's daily lives."[47] However, the ADAAA confirmed that an impairment need only substantially limit one major life activity to be covered, not multiple activities.[48]

Both FEHA and the ADAAA now lead to the same result: broad definitions of disability and expanded coverage.

Temporary Disabilities May Be Covered

An impairment need not last a particular length of time to be considered substantially limiting under the ADAAA.[49] However, certain transitory impairments may be excluded from the "regarded as" definition. For more information, see "'Record Of,' 'Regarded As' and 'Perceived As' Defined" on page 844.

California law can also provide protection to transitory impairments that "limit" a major life activity. The focus should be on the nature and severity of the impairment and its affect on any major life activity.

In a federal case of first impression, the court ruled that "a sufficiently severe temporary disability" may be protected under the amendments to the ADAAA. The court noted that the ADAAA was intended by Congress to liberalize the ADA "in favor of broad coverage," and Congress specifically directs courts to interpret the amended statute as broadly as possible.[50]

In this particular case, an employee injured his knee, resulting in two surgeries involving plates and pins. His doctors instructed him not to put any weight on his left leg for six weeks and estimated he would not be able to walk normally for seven months.

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45. 2 CCR 11064(l)(3)
46. 29 C.F.R. 1630.2(j); 2 CCR 11065([illegible]
47. *Toyota Manufacturing Company, Ke*[illegible] 534 U.S. 184 (2002)
48. 42 U.S.C. 12102(4)(c)
49. 29 C.F.R. 1630.2(j)
50. *Summers v. Altarum Institute Corp* [illegible]

The employee contacted his employer's HR representative about working from home as he recovered. The employer never followed up with the employee to discuss how he could begin to return to work. Instead, a month and a half after the accident, the employee was terminated so the employer could place another analyst at the client's office.

The employee sued, alleging that his employer unlawfully fired him because of his disability and failed to reasonably accommodate him. The trial court dismissed the lawsuit and held that a temporary condition, even up to a year, was not covered under the ADA. But the trial court relied on cases that were decided before the amendments to the ADA. The employee appealed.

On appeal, the court held that a sufficiently severe temporary disability may constitute a disability and that the employee could proceed with his lawsuit. The employee alleged that his accident left him unable to walk for seven months and that without surgery, pain medication and physical therapy, he "likely" would not have been able to walk for far longer. The court found that the text and purpose of the ADAAA "make clear that such impairment can constitute a disability."

In California, the test for what constitutes a disability is already, in many respects, broader than the federal test since an individual need only be "limited" in performing a major life activity, and even a transitory condition may "limit" a major life activity. State disability regulations exclude "mild conditions" from the definition of disability if these conditions do not limit a major life activity. For more information, see "Exclusions From Disability" on page 843.

If you have any questions on whether an employee's impairment requires accommodation, consult legal counsel. Employers should not make these decisions alone because a misstep can result in significant liability. Even if the impairment does not ultimately qualify as a "disability," it may qualify as a "serious health condition" entitling the employee to time off under the federal Family and Medical Leave Act or the California Family Rights Act.

Inability to Work Under a Particular Supervisor May Not Be Covered

New 2016

In a 2015 case, a court ruled that an inability to work under a particular supervisor because of anxiety and stress related to the supervisor's standard oversight of job performance is not a disability recognized in California's Fair Employment and Housing Act (FEHA).[51] However, it is important to note that each case requires careful examination of the facts.

In this case, the employee saw her doctor and told him that she was experiencing stress related to interactions at work with human resources and her manager. Her doctor diagnosed her as having adjustment disorder with anxiety; a "type of stress-related mental illness." Based on the diagnosis, the employer granted the employee leave first under family and medical leave laws and then as a reasonable accommodation. During her time off, she indicated that she could only return if assigned to a different department.

Toward the end of her leave, the employee was informed that she would be terminated unless she provided information either when she would be able to return to her clinical assistant position, or what additional leave as an accommodation would allow her to return to work. She did not provide this information. Instead, her doctor told her employer that she was not medically cleared to return to work. She testified that she was not ready to return to work at that time if she had to report to the same supervisor and manager, but then provided conflicting testimony that she would have been "willing to try" to return.

The employee was terminated and sued for disability discrimination. Her only alleged disability was her adjustment disorder with anxiety. She never returned to work because of her disability and because she could not work under her current supervisor.

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[51] *Higgins-Williams v. Sutter Medical Foundation*, 237 Cal.App.4th 78 (2015)

The court ruled that she could not proceed with her case because she did not have a qualifying disability. According to the court, an employee's inability to work under a particular supervisor because of anxiety and stress related to the supervisor's standard oversight of the employee's job performance does not constitute a mental disability under FEHA. The sole alleged disabling condition was stress when dealing with her particular manager.

This case could have turned out differently if the employee had been able to show that she was, in fact, disabled. The ruling from this case is limited in scope because the employee's sole disability was anxiety caused by one particular supervisor's routine supervision.

But an employee could be suffering from psychological issues, such as major depression, bipolar disorders and anxiety disorders, that would be covered under state and federal disability laws. Federal and state agencies will generally enforce these protections broadly.

Mental impairments can often affect an individual's ability to interact with others. If the employee in this case was impaired in interactions with other employees (not just the one supervisor) on a regular and severe basis, the case may have turned out differently.

In fact, amended regulations under the Americans with Disabilities Act (ADA) specifically state that protections should be broadly construed in favor of expansive coverage, and the ADA's primary focus is on whether discrimination occurred; not the determination of whether there was a disability.

When faced with an accommodation request from an employee claiming a physical or mental disability, the employer should not act alone and make a decision about whether the employee is really suffering from a disability. If you question whether an employee's condition amounts to a disability, call your employment counsel.

'Major Life Activities' Defined

Impairments that limit "major life activities" and meet the legal definition of "disability" include impairments that cause inability or difficulty in:

- Caring for oneself
- Performing manual tasks
- Walking
- Lifting
- Bending
- Seeing
- Hearing
- Speaking
- Breathing
- Sleeping
- Reproduction
- Learning
- Thinking
- Concentrating
- Reading

- Interacting with others
- Communicating
- Working
- Participating in community activities[52]

The ADAAA significantly expanded the list of what would be considered major life activities under the original ADA and United States Supreme Court decisions that narrowed the definition.

The ADAAA and California's disability regulations also include the "operation of a major bodily function" in the definition of major life activities. This includes functions of the immune system, reproductive functions, normal cell growth, special sense organs and skin, digestive functions.[53]

California's FEHA states that the term "major life activities" is to be broadly construed and includes physical, mental, social and employment-related activities.[54]

Examples of Disabilities

Examples of physical or mental impairments include, but are not limited to:

- Contagious and noncontagious diseases and conditions, such as orthopedic, visual, speech and hearing impairments
- Cerebral palsy
- Epilepsy
- Muscular dystrophy
- Multiple sclerosis
- Cancer
- Heart disease
- Diabetes
- Mental disabilities
- Emotional illness
- HIV
- Tuberculosis
- Specific learning disabilities
- Drug addiction
- Alcoholism

Morbid Obesity

Some federal courts are beginning to treat severe or morbid obesity as a disability under the ADAAA, and the EEOC has indicated a willingness to prosecute such cases.

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[52] 42 U.S.C. 12102 (2)

[53] 29 CFR 1630.2(h):2 CCR sec. 11065(l)

[54] Govt. Code sec. 12926(i)(1)(C)

The federal Equal Employment Opportunity Commission (EEOC) reached a settlement with a military vehicle manufacturing company that allegedly fired an employee because he was morbidly obese.

According to the EEOC, the disability discrimination provisions of the Americans with Disabilities Act (ADA) protect morbidly obese employees and applicants. “So long as an employee can perform the essential job duties of a position, with or without reasonable accommodation, the employee should be allowed to work on the same basis as any non-obese employees. Employers cannot fire disabled employees based on perceptions and prejudice.”

The employee weighed nearly 700 pounds at the time he was fired. The EEOC alleged that the employee was qualified to perform the essential job functions of his material handler position. The EEOC also alleged that the company did not engage in any discussions to determine if reasonable accommodations were available.

The EEOC asserted that the employee’s morbid obesity substantially limited him in one or more major life activities and rendered him “disabled” under the ADAAA. The EEOC further asserted that the company “regarded” the employee’s morbid obesity as a disability, even if a court should hold that obesity was not a disability within the meaning of the ADA.

The EEOC takes the approach that severe obesity qualifies as a disability and that it does not need to be caused by an underlying physiological condition (such as a cardiovascular disease). At least one federal court has agreed with the EEOC.[55]

The American Medical Association officially recognizes obesity as a disease, which may result in even more protection for the overweight as disabled. This is certainly an expanding area for employers to watch.

Both San Francisco and Santa Cruz separately prohibit discrimination on the basis of weight in employment and recruiting.

In *Cassista v. Community Foods, Inc.*, the California Supreme Court excluded obesity from the disability definition, unless it results from a physiological condition that affects one or more basic bodily systems and limits a major life activity.[56] However, the Legislature directly reversed that decision. FEHA states that, in spite of the California Supreme Court’s interpretation, the Legislature intends to provide protection when an individual is erroneously or mistakenly regarded as having any physical or mental condition that limits a major life activity.[57]

Exclusions From Disability

The following conditions are specifically excluded from the ADA definition of disability:[58]

- Transvestism
- Transsexualism
- Gender identity disorders
- Voyeurism
- Exhibitionism
- Pedophilia

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[55] *EEOC v. Resources for Human Development, Inc.*, 827 F.Supp.2d 688 (E.D. La. 2011)

[56] *Cassista v. Community Foods Inc.*, 5 Cal. 4th 1050 (1993)

[57] Govt. Code sec. 12926.1.(d)

[58] 42 U.S.C. 12211

- Compulsive gambling
- Kleptomania
- Pyromania
- Psychoactive substance use disorders that result from the current illegal use of drugs

California's disability regulations also clarify that conditions that are mild, do not limit a major life activity and have little or no residual effects are not disabilities. A determination must be made on a case-by-case basis. Examples include:

- The common cold or flu
- Minor cuts
- Sprains, aches and bruises
- Non-migraine headaches
- Minor and non-chronic gastrointestinal disorders.[59]

Unacceptable conduct that is a consequence of a disability is not protected under the ADA.[60] For example, loud, abusive behavior that is a result of alcoholism is not protected under the ADA.

'Record Of,' 'Regarded As' and 'Perceived As' Defined

In addition to protecting individuals who have disabilities, disability discrimination laws also prohibit discrimination against individuals with a "record of" a disability, who are "regarded as" disabled, who are "perceived as" disabled, and who are "perceived as potentially" disabled.

California's disability regulations state that a "Record or History of Disability" includes previously having, or being misclassified as having, a record or history of a mental or physical disability or special education health impairment of which the employer or other covered entity is aware.[61]

An individual who does not currently have a disability but who had a disability in the past meets the "record of" definition of disability. This includes individuals who have a history of or have been misclassified as having a mental or physical impairment that limits one or more major life activities, such as:[62]

- A person with a history of cancer that is currently in remission.
- A person with a history of mental illness.
- An individual whose face has been severely disfigured by burns, but who is not substantially limited in one or more of the major life activities.

An employee is "regarded as" having a disability if he/she has been subjected to an adverse employment action because of an actual or perceived physical or mental impairment, whether or not the impairment actually limits or is perceived to limit a major life activity, unless the impairment is transitory and minor. A transitory impairment is an impairment with an actual or expected duration of six months or less.[63]

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[59] 2 CCR sec. 11065 (d)(9)(B)

[60] *Newland v. Dalton*, 81 F.3d 904 (9th Cir. 1995)

[61] 2 CCR 11064(d)(4)

[62] *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987)

[63] 42 U.S.C. 12102

According to an EEOC fact sheet, the revised ADAAA standard of "regarded as" having a disability is broader than the original ADA standard. An employee must no longer demonstrate that the employer believed the actual or perceived impairment substantially limited the employee in a major life activity. To read a complete version of the fact sheet, visit www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

California's disability regulations define what constitutes a "perceived disability" for purposes of state law. Perceived disability includes:

- Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental or physical condition or adverse genetic information that makes achievement of a major life activity difficult; or
- Being subjected to a prohibited action based on an actual or perceived physical or mental disease, disorder, or condition, or cosmetic disfigurement, anatomical loss, adverse genetic information or special education disability or its symptom, such as taking medication, whether or not the perceived condition limits or is perceived to limit a major life activity. Prohibited actions include non-selection, demotion, termination, involuntary transfer/reassignment or denial of any term, condition or privilege of employment

Treating an employee adversely because of a perceived impairment is a violation of the law, regardless of whether the impairment either actually limits or is perceived to limit a major life activity.

Under California's disability regulations, an individual has a "perceived potential disability" if an employer regards him or her as having (or having had) a condition that has no present disabling effect, but which may become a disability in the future.[64] This definition is broad, and it is unclear how it will be interpreted by the courts. Whether an employee is actually disabled is irrelevant if you discriminate against the employee based on a perception of disability.[65]

Correctable Impairments May Be Disabilities

The ADAAA mandates that the positive effects of mitigating measures (except for ordinary eyeglasses and contact lenses) should not be taken into consideration when determining whether an impairment is substantially limiting. The California disability regulations also mandate that mitigating measures or reasonable accommodation should not be taken into account in determining if the impairment is limiting for the purposes of state disability protections. Mitigating measures eliminate or reduce the symptoms or impact of an impairment.[66] For example, medication can correct high blood pressure, but the corrective effects should not be considered when determining if there is a substantial limitation.

The ADAAA states that part of the Act's purpose is to reject the requirement that the U.S. Supreme Court stated in *Sutton v. United Air Lines, Inc.*, and its companion cases. There, the Court stated that an employer can take the positive effects of mitigating measures into account when determining if an impairment substantially limits a major life activity.[67] Instead, under current law and in the ADAAA, an employer must ignore the positive effects of mitigating measures on whether the employee has a disability.

Under FEHA, California employers also cannot take into consideration whether an impairment is correctable. FEHA states that you must determine if a disability limits a major life function without considering mitigating measures, such as medications, assistive devices or other reasonable accommodations, unless the mitigating measure itself limits a major life activity.

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[64] 2 CCR sec. 11065 (d)(6)

[65] *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362 (9th Cir. 1996)

[66] 29 CFR 1630.2(i)

[67] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999)

Mitigating measures can include — but are not limited to — medication, medical equipment and devices, prosthetics, hearing aids, low vision devices, mobility devices, assistive animals (such as guide dogs), psychotherapy and surgical interventions that do not permanently eliminate an impairment.

Mitigating measures may affect the reasonable accommodation process. For example, a mitigating measure may eliminate the need for a reasonable accommodation. For more information, see "Reasonable Accommodation of Disabilities" on page 847.

"Qualified" Individual Defined

Disability discrimination laws do not protect an individual unless he/she is a qualified individual.

A "qualified" individual is a person who meets the legitimate skill, experience, education or other job-related requirements of an employment position that he/she holds or seeks and who can perform the essential functions of the position with or without reasonable accommodation. An individual is not unqualified because he/she is unable to perform marginal or incidental job functions.[68]

If the individual is qualified to perform essential job functions except for limitations caused by a disability, you must consider if the individual could perform these functions with a reasonable accommodation. Generally, the courts consider a written job description as evidence, though not necessarily conclusive, of the essential functions of the job.

You are free to select the most qualified applicant available and to make decisions based on reasons unrelated to the existence or consequence of a disability. For example, two people apply for a job opening as a typist. The first is a person with a disability who accurately types 50 words per minute. The second is a person without a disability who accurately types 75 words per minute. You can hire the applicant with the higher typing speed if typing speed is necessary to successfully perform the job.

You are not required to hire or retain an individual who is not qualified to perform the job. For more information, see "Proving Discrimination" on page 829.

Disability discrimination laws do not prohibit a religious corporation, association, educational institution or society from giving preference in employment to its own members.

'Essential Job Functions' Defined

To determine if you must consider qualified disabled people for job openings and promotions, you must determine if the disabled person can perform the essential job functions.[69]

You must determine the essential job functions, both as the criteria for deciding the ability of a disabled person to perform the job and as a defense against any subsequent claim of discrimination. According to California's disability regulations, a job function may be considered essential for any of several reasons, including:[70]

- The function may be essential because the position exists to perform that function
- The function may be essential because there are a limited number of employees available to perform this function
- The function may be highly specialized and the person in the position is hired for his or her particular expertise or skill

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[68] 29 CFR sec. 1630.2(m); Lab. Code sec. 12926(i

[69] 42 U.S.C. 12111(8)

[70] 2 CCR sec. 11065 (e)

California's disability regulations describe several factors that can be evidence of whether a particular function is essential to the job, including:[71]

- The employer's judgment as to which functions are essential
- Accurate, current, written job descriptions
- The amount of time spent on the job performing the function
- The legitimate business consequences of not requiring the incumbent to perform the function
- The job descriptions or job functions contained in a collective bargaining agreement
- The work experiences of past incumbents in the job
- The current work experience of incumbents in similar jobs
- Reference to the importance of the performance of the job function in prior performance reviews

Essential functions do not include "marginal" functions that could be performed by another employee or in another way. They also do not include those functions that, if not performed, would not eliminate the need for the job.

Determining essential functions is one of the least clear provisions of the disability discrimination laws. Take the following steps when determining essential job functions:

1. Document all important job functions.
2. Be accurate and realistic.
3. Stay current.
4. Be flexible.
5. Review job descriptions with employees.
6. Document agreement.

Disability discrimination laws do not limit your ability to establish or change a job's content, nature or functions. You have the right to establish what a job is and what functions are required to perform it. The laws require that you evaluate the qualifications of an individual with a disability in relation to the job's essential functions.

Reasonable Accommodation of Disabilities

State and federal disability laws require covered employers to reasonably accommodate an individual's disability if the employer knows of the disability, unless the employer can demonstrate that the accommodation would impose an undue hardship.

A "reasonable accommodation" is any modification or adjustment in a job, an employment practice or the work environment that allows an individual with a disability to enjoy an equal employment opportunity.[72] It is also any modification or adjustment that is effective in enabling an employee to perform the essential functions of the job the employee holds or desires or to enjoy equivalent benefits and privileges of employment that similarly situated employees without disabilities enjoy.

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[71] 2 CCR sec. 11065 (e)

[72] 29 CFR sec. 1630.2(o), 2 CCR sec. 11065(p)

The reasonable accommodation obligation is an ongoing duty and may arise anytime a person's disability or job changes. Disability discrimination laws do not require you to make any modification, adjustment or change to a job or policy that you can demonstrate would fundamentally alter the essential functions of the job in question.

California's disability regulations provide guidance on reasonable accommodation and the interactive process.

Examples of Accommodations

The term "reasonable accommodation" includes, but is not limited to:[73]

- Providing personal assistants or attendants to help a qualified individual with a disability perform an essential job function
- Making existing job facilities used by employees readily accessible to and usable by disabled individuals (this may include providing accessible breakrooms or restrooms, or reserving parking spaces)
- Job restructuring
- Part-time or modified work schedules
- Reassignment to a vacant position for which the individual is qualified
- Acquiring or modifying equipment or devices
- Modifying examinations, training materials or policies
- Providing assistive aids such as qualified readers or interpreters
- An unpaid extension of a paid or unpaid leave
- Allowing employees to bring assistive animals to the worksite (employers may require that assistive animals be free from offensive odors, housebroken, trained to assist the employee, and that they not endanger the health or safety of anyone in the workplace)
- Changing supervisory methods (e.g., dividing complex tasks into smaller parts)
- Providing additional training
- Permitting an alteration of when and/or how an essential function is performed
- Providing an adjustment or modification of examinations, training materials or policies
- Modifying an employer policy
- Working from home

! Employers may not retaliate against employees who refuse to accept an accommodation.

Examples of Unreasonable Accommodations

Reasonable accommodation does not require you to:

- Find a different position for an applicant who is not qualified for the position he/she originally sought.

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[73] 42 U.S.C. 12111(9)

- Lower quality or quantity standards to make an accommodation.
- Provide personal use items, such as glasses or hearing aids.

Accommodating Residual Effects of a Disability

Employers must reasonably accommodate an employee who is suffering the "residual effects of a disability." This means that even if an employee is not currently disabled, the employer must work with the employee to accommodate doctors' appointments, monitoring, or other issues related to the prior disability. Employers may not have to accommodate the residual effects of a disability if doing so will cause the business undue hardship.[74]

Interactive Process for Reasonable Accommodations

When an employee or applicant with a known disability or medical condition requests reasonable accommodation, FEHA requires you to engage in a timely, good-faith interactive process to determine effective reasonable accommodations.[75] California's disability regulations make clear that both the employer and the employee shall exchange essential information in this process without delay or obstruction.[76] The interactive process is an ongoing effort.

The law does not explain to what extent you must go in engaging in a timely, good-faith interactive process. At a minimum, you should meet with the employee or applicant to discuss possible reasonable accommodations. Be open to the employee's or applicant's suggestions. Be willing to try various accommodations in an attempt to find one that is successful. Document this process.

FEHA states that an employer must engage in the interactive process "in response to a request for a reasonable accommodation by an employee ..."[77] An employer, under California's disability regulations, will also need to start the process when the employer becomes aware of the need for an accommodation (for more information, see "Obligations of the Employer in the Interactive Process" on page 849). The interactive process is a collaborative effort between the employer and the employee to determine what accommodation, if any, can help the employee perform the essential functions of his/her position.

The employer should consider the preference of the employee to be accommodated in the interactive process, but has the right to select and implement an accommodation that is effective for both the employer and employee.[78]

California's disability regulations clarify that direct communications between the employer and the applicant or employee requesting accommodation are preferred, but not required.[79]

Obligations of the Employer in the Interactive Process

California's disability regulations require an employer to initiate the interactive process when any of the following events occur:

- An applicant or employee with a known disability requests an accommodation.
- The employer becomes aware of the need for an accommodation through a third party.[80]

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74. 2 CCR sec. 11068(g)
75. Govt. Code sec. 12926.1(e)
76. 2 CCR sec. 11069(a)
77. Govt. Code sec. 12940(n)
78. 2 CCR sec. 11068(e)
79. 2 CCR sec. 11069(d)(4)

- The employer becomes aware of the need for an accommodation by observation.
- The employer becomes aware of the possible need for accommodation because the employee has a disability and has exhausted leave under the California Workers' Compensation Act, the California Family Rights Act, or the Family and Medical Leave Act, but the employee's health care provider indicates that further leave is necessary for the employee to perform the essential functions of his job. Employers who offer to engage in the interactive process when an employee has exhausted a leave of absence are not in violation of laws prohibiting inquiries into medical information.[81]

To comply with FEHA, an employer may either:

- Grant the employee or applicant's requested accommodation, or
- Reject the initial accommodation and initiate discussion regarding alternatives.

When the disability or need for accommodation is not obvious, the employer may require an employee requesting accommodation to provide reasonable medical documentation[82] (see "Documentation of Disability" on page 859). Employers may consult an expert, such as a company physician, during the interactive process.

When needed to assess a requested accommodation, the employer shall analyze the essential functions of the employee's job.[83]

In consultation with the employee, the employer should identify potential accommodations for the employee, and consider the effectiveness of the accommodation to allow the employee to perform essential functions and, the employee's preference in implementing an accommodation. If the employer considers reassigning the employee to another position, the employer may ask an employee about his or her qualifications for that position (see "Reassignment as a Reasonable Accommodation" on page 851).

"Perceived" Disabilities and the Interactive Process

An interviewing manager who perceives an otherwise qualified applicant as having a disability cannot reject the applicant without engaging in the "interactive process" that federal and state laws require. Similarly, an employee returning to work with restrictions following a job-related injury may be perceived as disabled by the employer. If so, the employer should not terminate or discipline the employee without the employer and employee engaging in the interactive process.

Obligations of the Employee in the Interactive Process

Employees must cooperate in good faith in the reasonable accommodation process, and provide medical documentation where a disability or need for accommodation is not obvious and the documentation is requested by the employer[84] (see "Documentation of Disability" on page 859). Employees must also give their employers information about education or work history that might qualify them for alternative positions.

An employee's mental or physical condition may prevent him or her from participating in the interactive process; if this happens, it does not constitute a breach of disability laws.

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80. 2 CCR sec. 11069(b)
81. 2 CCR sec. 11069(b)(3)
82. 2 CCR sec. 11069(c)(2)
83. 2 CCR sec. 11069(c)(5)
84. 2 CCR sec. 11069(d)

Employees who request to bring assistive animals into the workplace may be required to supply a letter from their health care provider of the need for the animal, as well as confirmation that the animal will behave appropriately in the workplace.[85] Within the first two weeks, if the animal is offensive or disruptive at work, the employer may challenge the animal's fitness for serving the employee.

Employer Must Go Beyond Initial Accommodation

You must try more than once to accommodate an employee under the ADA, according to a decision from the Ninth Circuit Court of Appeals. In *Humphrey v. Memorial Hospitals Association*, Carolyn Humphrey filed a disability discrimination claim against her former employer, Memorial Hospitals Association (MHA). Humphrey consistently received excellent performance reviews working for MHA as a medical transcriptionist, but then began having attendance problems. She received two separate formal discipline notices from MHA.

When physicians diagnosed Humphrey with Obsessive Compulsive Disorder, which they felt caused her frequent tardiness, MHA agreed to let her work flexible hours to accommodate the disability. When Humphrey's attendance problem continued, she asked to work from home, as many transcriptionists did, as a further accommodation. MHA denied the request, citing its policy of refusing work-at-home requests for employees who were involved in a disciplinary process. Eventually MHA terminated Humphrey for poor attendance.

The court held that MHA should have continued to discuss accommodations with Humphrey because the company knew that the initial accommodation was failing. The ADA encourages you to find accommodations that really work.[86]

Reasonable Accommodation Obligation Is Ongoing

A "good faith" interactive process is an ongoing effort. In *A.M. v. Albertsons, LLC*, an employer allowed an employee to consume beverages while on the job and to use the bathroom more frequently as a reasonable accommodation. However, a new supervisor who did not know about the necessary accommodation refused the employee's request on one occasion. The employer was sued.[87]

The court concluded that the employer's obligation to provide reasonable accommodation is ongoing and that even one denial of the accommodation can result in legal liability. This employer did not always document when a reasonable accommodation had been granted. The employer did not always provide accommodation information to new supervisors.

This case reinforces the need for good documentation of reasonable accommodation and the importance of keeping supervisors up-to-date on needed accommodation.

Reassignment as a Reasonable Accommodation

If the employee can no longer perform the essential functions of his/her job, reasonable accommodation might include transfer to a different job or schedule.[88] Simply because the employee is able to return to work does not relieve you from your ongoing reasonable accommodation obligations if the employee has such need.

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[85] 2 CCR sec. 11069(e)

[86] *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128 (9th Cir. 2001)

[87] *A.M. v. Albertsons, LLC*, 178 Cal. App. 4th 455 (2009). See also, *Swanson v. Morongo Unified School District*, 232 Cal. App. 4th 954 (2014)

[88] 2 CCR sec. 11068(d)

As part of the interactive process, employers should evaluate suitable alternate, vacant positions for an employee with a disability. Employers shall offer disabled employees alternative positions when:

- The employee is qualified for the position; and
- The employee can no longer perform the essential functions of his current position even with accommodation; or
- Accommodation of the employee's current position creates undue hardship; or
- Both the employer and the employee agree that reassignment is preferable to an accommodation in the current position; or
- The employee requests reassignment to gain access to medical treatment for a medical condition that is not easily accessible at his current location.

If there are no funded, vacant comparable positions available for an employee with a disability, the employer may reassign the employee to a lower graded or lower paid position.

An employer is not required to create a new position to accommodate an employee with a disability to a greater extent than an employer would offer a new position to any employee, regardless of disability.

An employee with a disability is entitled to preference in reassignment to a vacant position over other applicants and existing employees. However, an employer is not ordinarily required to ignore its seniority system to accommodate an employee. If an employer reserves the right to modify its seniority system or regularly allows variations to the policy, it may be reasonable to violate a seniority policy to accommodate a disabled employee.

Employers should only reassign employees returning to work from a disability to an alternative position after participating in the interactive process.[89] During the interactive process, employers may offer to reassign a disabled employee to a temporary position. The employee may choose to accept or reject the offer. However, assignment to a temporary position is not considered a reasonable accommodation under California's disability regulations.

New 2016

A California court confirmed that reasonably accommodating an employee with a disability does not include putting an employee into a position that he/she is not qualified for, and that an employer is not required to continue to employ the person on an open-ended leave of absence while waiting for an appropriate vacant position to arise.[90]

Tony Nealy worked for the City of Santa Monica (the City) for more than a decade. He worked as a solid waste equipment operator and then became a groundskeeper after suffering back and knee injuries. After another work-related injury in 2006, Nealy's doctor took him out of work and Nealy underwent some surgeries.

In 2010, after a doctor released Nealy back to work, with some medical restrictions, the City met with Nealy to discuss his ability to work. Nealy and the City agreed that he could not perform his groundskeeper position based on Nealy's medical restrictions, which prevented him from kneeling, bending, stooping, squatting, walking on uneven terrain, running and prolonged standing.

Nealy indicated he wished to return to his earlier position as a solid waste equipment operator. Based on Nealy's restrictions, the City identified numerous essential functions of the solid waste equipment operator position that he could not perform and told him it could not accommodate him in the solid waste equipment operator position.

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[89] 2 CCR sec.11068(d)

[90] *Nealy v. City of Santa Monica*, 234 Cal.App.4th 359 (2015)

The City then conducted a search for an alternative job and identified one vacant position, a city planning staff assistant, which was not a promotion. Nealy submitted an application for the position. The City's human resources manager determined he did not meet the position's minimum qualifications because he lacked two years of recent experience performing clerical support duties.

Because Nealy was not minimally qualified for the only vacant position that was not a promotion, the City terminated his employment. Nealy then filed a lawsuit against the City. The court held that the City met its obligations with respect to reassignment.

Nealy did not meet the qualifications for the only vacant (nonpromotional) position available; the City did not have to put him into a position for which he did not qualify; the City also did not have to continue to employ Nealy on an open-ended leave of absence while waiting for an appropriate vacant position to arise.

Although this case confirms that employers do not need to eliminate essential job functions, a reasonable accommodation might include making modifications to when or how an essential function is performed.

Always engage in the interactive process and proceed with caution when managing disability accommodations. It is a best practice to consult an employment attorney with any questions about whether a job function is essential or before deciding to terminate an employee who has requested reasonable accommodation.

Telecommuting as a Reasonable Accommodation

Working from home may be a reasonable accommodation under both federal and state law.

California's disability regulations include "permitting an employee to work from home" as an example of one type of reasonable accommodation that employers should consider.

On the federal level, the EEOC has recognized that permitting an employee to work remotely may be a reasonable accommodation. The EEOC has taken the position that the type of cases where telecommuting is a potential reasonable accommodation has expanded, especially with changing technology.

For more information, see "Telecommuters" in Chapter 6, page 112.

Extended Disability Leave as a Reasonable Accommodation

Under the ADA and California's FEHA, California employers must engage in a good-faith interactive process to determine if any necessary accommodations exist for an individual.

California's disability regulations make clear that extending a leave of absence beyond that time provided by a mandatory leave law, such as FMLA or CFRA leave, may be a reasonable accommodation in some instances. Holding a job open for an employee on a leave of absence or extending a leave beyond CFRA, FMLA, other leave laws or an employer's own leave plan may be a reasonable accommodation provided that the leave is likely to be effective in allowing the employee to return to work at the end of the leave and provided it does not create an undue hardship. However, the regulations specifically state that an employer is not required to provide an indefinite leave of absence as a reasonable accommodation.[91]

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[91] 2 CCR sec. 11069(c)

Employers need to remember that extended leave beyond an employee's 12-week FMLA/CFRA allotment may be a reasonable accommodation under the ADA and FEHA. Employers should consider this issue when faced with an employee who cannot return from FMLA/CFRA leave due to a continuing medical issue.

Moreover, employer return-to-work rules that do not assess the needs of each employee individually are inconsistent with this requirement. For instance, blanket return to work rules that require the employee to be one-hundred percent healed before returning to work have been found to be unlawful.

The EEOC negotiated a $2.2 million out-of-court settlement of a federal ADA claim. The employer maintained a blanket return-to-work policy and would not reinstate employees after an extended disability leave. The employer's policy failed to properly accommodate employees under the ADA.[92] This settlement reinforces the importance of engaging in the interactive process with employees.

Attendance and Accommodations

In some cases, regular attendance at work constitutes an essential job function. If an employee cannot attend work on a regular basis in a job that requires face-to-face customer contact, allowing the employee to work from home is not a reasonable accommodation.[93]

Regular attendance may be an essential function for jobs that require:

- The employee to work as part of a team
- Face-to-face interaction with other employees or with clients/customers
- On-site use of items and equipment

Exceptions do exist, and employers bear the burden of showing that attendance is an essential function of the particular position at issue.

In *Samper v. Providence St. Vincent Medical Center*, the federal court of appeals for the Ninth Circuit ruled that the ADA does not obligate a hospital to reasonably accommodate a neonatal nurse's request to "opt out" of its attendance policy.[94]

The nurse never requested a specific number of unplanned absences, but simply wanted to be able to miss work when she needed to. The court found that this request exceeded any notion of reasonableness and potentially compromised patient safety.

The hospital tried to accommodate the nurse over the years through various scheduling changes, but her poor attendance continued. According to the hospital, absences among NICU staff jeopardize patient care. The nurse admitted that her absences affected teamwork and caused hardship for her co-workers.

The court ruled that regular attendance at the hospital was an essential function of the neonatal nurse position that did not require accommodation. "'Except in the unusual case where an employee can perform all the duties from home, an employee who does not come to work cannot perform any of his job functions, essential or otherwise.'"

According to the court, the skills required by the nurse's job were not "fungible" — the hospital could not simply swap out who did the job on any given day. It could be difficult for the hospital to find a qualified person with the specialized skills to perform life-saving work when the nurse failed to show up. The pool of staff to choose from was limited.

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[92] EEOC statement, 11-22-06

[93] *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442 (8th Cir. 1998)

[94] *Samper v. Providence St. Vincent Medical Center*, 675 F.3d 1233 (9th Cir. 2012)

Employers do not have to provide accommodations that compromise performance quality, according to the court. In this situation, a NICU nurse's reliable, dependable performance is predicated on her regular, predictable attendance.

Attendance accommodations might be an option for even some nursing positions. Though unlimited, unplanned absences may never pass muster, the decision might not have been as clear cut if the nurse worked in an area where nurses were frequently rotated, where there was a large pool of staff that could fill in at the last minute and where the nurses did not need specialized skills.

For more information on extended disability leave and the interactive process, see "Extended Disability Leave as a Reasonable Accommodation" on page 853.

Remember that you cannot count days off that are protected under a state or federal law as violations of your attendance policy.

Seniority System and Accommodation

The U.S. Supreme Court ruled that a request for a job change to accommodate an employee's disability may not be "reasonable" if it requires the employer to violate a seniority policy.

In *U.S. Airways, Inc. v. Barnett*, the Court decided that, typically, the seniority policy must prevail. The employee must prove "special circumstances" that make the exception to the seniority rule reasonable. Examples of special circumstances include lack of consistency in administering the seniority policy and the existence of other exceptions to applying the seniority policy. Employees must perceive the seniority policy as creating a systematic way of assigning jobs and allocating wages and benefits.[95]

In this case, the seniority rule was not part of a collective bargaining agreement. The U.S. Supreme Court did defer to seniority provisions in collective bargaining agreements in *Trans World Airlines, Inc. v. Hardison*.[96]

Consistent with the Court's ruling in *Trans World Airlines*, California's disability regulations provide that an employer is not ordinarily required to ignore its seniority system to accommodate an employee. However, if an employer reserves the right to modify its seniority system or regularly allows variations to the policy, it may be reasonable to violate a seniority policy to accommodate a disabled employee.

Failure to Accommodate

Failure to reasonably accommodate an employee is unlawful, and an employee may be able to recover damages unless the employer can demonstrate undue hardship, as defined by the law. An employee can also bring a claim for failure to engage in the interactive process. In addition, under FEHA, the mere act of requesting a reasonable accommodation is protected activity and an employer cannot discriminate or retaliate against a person for requesting the accommodation — regardless of whether the request was granted.[97] For more information, see "Disability Retaliation and Interference Claims" on page 873.

Undue Hardship

You are not required to reasonably accommodate a qualified individual with a disability if you can show that the accommodation would cause an undue hardship. The term "undue hardship" includes any accommodation that is unduly costly, extensive or substantial to you or that would fundamentally alter the nature your business's operation.[98]

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[95] *U.S. Airways, Inc. v. Barnett*, 122 S.Ct. 1516 (2002)

[96] *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977)

[97] Govt. Code secs. 12940(m), (n)

The EEOC and the DFEH determine if a particular accommodation imposes an undue hardship on a case-by-case basis. In general, a larger employer is expected to undertake greater efforts and expense to provide accommodation than a smaller employer. If a particular accommodation results in undue hardship, you must provide an alternative accommodation if the alternative is available and does not cause undue hardship.

Consider the following factors when you determine if undue hardship exists:

- The nature and cost of the accommodation[99]
- The overall financial resources of the facility involved in providing the accommodation, the number of people employed at the facility, the effect on the facility's expenses and resources and any additional impact that the accommodation might have upon the facility's operation[100]
- The type of the facility's operation, including the composition, structure and functions of the workforce[101]
- The availability of state, federal or local tax incentives
- The amount of assistance available from other agencies or organizations, including the California Department of Rehabilitation, the U.S. Department of Health and Human Services and other private and public agencies concerned with the physically and mentally disabled
- The geographic separateness of the facility involved in providing the accommodation[102]

California's disability regulations require employers to engage in the interactive process before determining that an undue hardship exists.[103] Consider consulting legal counsel prior to making an undue hardship determination.

Defenses

Employers may defend a claim of disability discrimination by demonstrating bona fide occupational qualifications (see "Bona Fide Occupational Qualification (BFOQ) as a Discrimination Defense" on page 767), business necessity (see "Business Necessity as a Discrimination Defense" on page 768), or threats to health and safety.

Factors courts will consider in determining the merits of a defense to a claim of disability discrimination include:

- The duration of the risk
- The nature and severity of the potential harm
- The likelihood that the potential harm will occur
- The imminence of the potential harm and
- Relevant information about the disabled employee's past work history [104]

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[98] 42 U.S.C. 12111(10)

[99] 42 U.S.C. 12111(10); Govt. Code sec. 12926

[100] 42 U.S.C. 12111(10); Govt. Code sec. 12926

[101] 42 U.S.C. 12111(10); Govt. Code sec. 12926

[102] 2 CCR sec. 11065(r)(5)

[103] 2 CCR sec. 11068(d)(5

[104] 2 CCR sec. 11068(d)(5)

Direct Threat to Health or Safety of Others

Under the ADA and FEHA, you are not required to hire or retain an applicant or employee who poses a "direct threat" to the health and safety of co-workers or others.

"Direct threat" means a significant risk to the health or safety of others that a reasonable accommodation cannot eliminate. You must determine if a reasonable accommodation would mitigate or eliminate the possibility of harm. You must determine that an individual with a disability will pose a direct threat to the safety of others on a case-by-case basis. You must identify specific conditions or behavior on the applicant's or employee's part that constitute the threat. The risk must be current, not speculative and remote. The risk must be based on reasonable medical judgment or other objective evidence, not on subjective perceptions, irrational fears or stereotypes.

Ensure that assessments of direct threat are based on current medical knowledge or other reliable evidence. Do not rely on generalized or frequently mistaken assumptions about the risks associated with certain disabilities.[105] Engage in the interactive process with the employee prior to determining that a health or safety risk exists.

Under FEHA, you can refuse to hire an applicant or you can discharge an employee if that individual cannot perform the essential duties of the job in a safe manner, even with reasonable accommodation. FEHA allows a broader defense than is allowed under the ADA.

You cannot claim that a disabled individual has a condition or disease with a future risk if the condition or disease doesn't interfere with an employee's job performance.

Direct Threat to Health or Safety of Self

FEHA clearly provides that an employee or applicant is not qualified if a disability poses a direct threat to his/her own health or safety.[106] California's disability regulations require employers to engage in the interactive process prior to determining that an employee's health or safety is at risk.[107] The EEOC's regulations on the ADA contain the same provision. The U.S. Supreme Court upheld this interpretation of the ADA when it ruled that a job applicant would not be a "qualified individual" under the ADA if the essential duties of the job would pose a direct threat to his/her own health or safety.

In *Chevron U.S.A. v. Echazabal*, an applicant claimed that he was unlawfully denied employment because the employer feared that exposure to refinery chemicals would aggravate his medical condition. The applicant was already working at the facility, but for a subcontractor. He then lost his job when the employer asked the subcontractor to reassign their employee to remove him from the refinery.

The Court determined that the "direct threat to self" defense must be based on a reasonable medical judgment about the specific applicant and an individualized assessment of the risks and harm. The harm must be more than a potential risk or harm. The ADA requires more than "the advice of a generalist and an expert in preventive medicine" to conclude that the individual's medical condition met the "direct threat" requirements.[108]

The U.S. Supreme Court cautioned employers to ensure that they based assessments of direct threat on individualized assessment and current medical knowledge or other reliable evidence. Do not rely on generalized or frequently mistaken assumptions about the risks associated with certain disabilities.

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[105] 2 CCR sec. 11067(c)

[106] Govt. Code sec. 12940(a)(1)

[107] 2 CCR sec. 11067(b)

[108] *Chevron U.S.A., Inc. v. Echazabal*, 122 S. Ct. 2045 (2002)

Food Handling Risk

You can refuse to assign food-handling duties to employees who have a communicable or infectious disease that can be transmitted to others through the handling of food, if the risk cannot be eliminated by reasonable accommodation.[109] The state Department of Public Health publishes its determinations of what constitutes "infectious and communicable diseases" twice a year.

Health Care Employees Threat to Others

In the health care industry, the court looks at a four-part test to evaluate the direct threat that a health care employee with an infectious disease poses to others:

- Nature of the risk — how the disease is transmitted.
- Duration of the risk — how long the individual is infectious.
- Severity of the risk — what is the potential harm to third parties.
- Probability that transmission will cause varying degrees of harm.

In *Waddell v. Valley Forge Dental Associates*, which involved an HIV-positive dental hygienist, the Eleventh Circuit Court of Appeals concluded that, although scientific evidence showed the risk of transmission to be small, the degree of harm to a patient if transmission did occur is so great as to render the employee unqualified. The U.S. Supreme Court denied review.[110]

Reasonable Accommodation and Hostile Conduct

Employers have a duty to protect employees from workplace violence. Disability protection laws will generally not prevent employers from disciplining employees who engage in, or threaten, workplace violence.

In its *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, the Equal Employment Opportunity Commission (EEOC) states that "nothing in the ADA prevent[s] an employer from disciplining an employee for threats or violence in the workplace."

According to the EEOC, the employer must be able to show that it enforces its policy consistently and doesn't discipline a disabled employee more harshly than other employees who do not suffer from a disability.

The following cases show examples of threatening conduct that was not entitled to protection under disability laws.

Case 1: In *Wills v. Superior Court of Orange County*, Linda Wills, who suffered from bipolar disorder, was terminated for violating her employer's policy against verbal threats, threatening conduct and violence in the workplace. The court ruled that an employer may discipline an employee for workplace threats or violence even if the misconduct is caused by the disability.[111] The court clarified that its decision was limited to the narrow context of conduct that involves threats of violence. The employer in the case did not try to claim that Wills posed a direct threat, but instead argued that it had the right to terminate her for violating company policy against workplace violence.

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[109] 42 U.S.C. 12113(e)(2)

[110] *Waddell v. Valley Forge Dental Associates*, 276 F.3d 1275 (11th Cir. 2001), cert.den., 122 S. Ct. 2293 (May 28, 2002)

[111] *Wills v. Superior Court of Orange County*, 194 Cal.App.4th 312 (2011)

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Case 2: In *Mayo v. PCC Structurals, Inc.*, the Ninth Circuit Court of Appeals ruled that an employee who was fired after threatening to kill some of his co-workers was not entitled to sue his former employer for disability discrimination.[112] The employee in the case made specific threatening comments about his supervisor and other managers and even provided specific details about his plan.

When the police questioned the employee about the threats, he admitted that he made the threats, that he had two or three people in mind, and that he owned several guns but hadn't decided which one to use. When asked if he planned to go to his workplace and start shooting people, the employee responded: "Not tonight."

After taking a three-month FMLA leave, the employee was cleared to return to work by a treating psychologist, but with the recommendation that the employee be assigned a new supervisor. The employer, however, decided to terminate the employee who then sued under the ADA.

The court ruled that the employee in this case was not a "qualified individual" entitled to job protection because of his extreme reactions to stressful situations. An essential function of almost every job, according to the court, is the ability to handle stress and interact with others. "And while an employee can be qualified despite adverse reactions to stress, he is not qualified when that stress leads him to threaten to kill his co-workers in chilling detail and on multiple occasions."

The court emphasized that it was only addressing the "extreme facts" that were presented to it and not a case involving less serious and credible threats of violence, such as expressions of frustration, inappropriate jokes, or rude, gruff or unpleasant behaviors.

In addition, because the employee did not dispute that another disturbing incident could occur if he faced similar stressful situations, the court rejected his argument that all he needed was a reasonable accommodation to report to a different supervisor.

The court noted that employers would face an impossible position if they could not discipline employees for exhibiting the type of extreme threatening conduct at issue in this case.

Case 3: In contrast to these cases, a federal court in *Gambini v. Total Renal Care* ruled that an employer was not allowed to separate an employee's outburst and related misconduct from her disability.[113] If a jury found that the employee's outburst was caused by or part of the disability, then the jury could find that the employer fired the employee because of her disability. This case did not involve threats of violence but did involve profanities and throwing papers at a supervisor.

Employers can take immediate steps to prevent and address violent behavior and threats in the workplace. Employers who want to discipline employees for threatening conduct that may be attributed to a disability are advised to first discuss the intended disciplinary measures with knowledgeable employment counsel.

Documentation of Disability

When a disability or the need for an accommodation is not known or obvious, you can ask an employee for reasonable documentation about his/her disability and its functional limitations that require reasonable accommodation.[114]

California's disability regulations provide detailed guidance on documentation requirements under California law. Reasonable medical documentation states that an employee has a physical or mental condition that limits a major life activity, and describes why the employee or applicant needs an accommodation to have an equal opportunity to:

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[112] *Mayo v. PCC Structurals, Inc.*, 795 F.3d 941 (9th Cir. 2015)

[113] *Gambini v. Total Renal Care*, 486 F.3d 1087 (9th Cir. 2007)

[114] 2 CCR sec. 11069(d)

- Participate in the application process or be considered for the job,
- Perform job duties, or
- Enjoy benefits and privileges of employment equal to non-disabled employees.

Documentation is sufficient if it:

- Describes the nature, severity and duration of the employee's impairment.
- Describes the activity that the impairment limits and the extent to which the impairment limits the employee's ability to perform the activity.
- Substantiates the need for the requested reasonable accommodation.

Disclosure of the nature of the disability is not required. Employers may not ask for unrelated documentation, such as an employee's complete medical records.

If an employee requests leave on an intermittent or reduced-schedule basis as an accommodation of a disability, the documentation should establish the medical necessity for such a schedule and an estimate of the dates and duration of treatment and any periods of recovery.[115] If the employee may suffer unforeseeable episodes of incapacity, such as the onset of migraines or epileptic seizures, documentation should establish the necessity for intermittent leave and an estimate of the frequency or duration of incapacity.

A medical certification should also provide the name and credentials of the employee's health care provider. A "health care provider" may include a medical doctor (licensed in any state or country), a marriage and family therapist, acupuncturist, podiatrist, dentist, clinical psychologist, optometrist, chiropractor, nurse practitioner or midwife, clinical social worker or physician's assistant.[116]

Documentation may be insufficient if it does not specify the existence of a disability and explain the need for reasonable accommodation. It may also be insufficient if the health care provider does not have the expertise to confirm the disability, or if it appears to be fraudulent.[117] If an employee or applicant submits insufficient documentation, the employer shall explain why the documentation is insufficient and allow the applicant or employee an opportunity to provide timely additional information. If the employee does not provide sufficient supplemental information, the employer may require the employee to go to an appropriate health care provider of the employer's choice (see "Physician's Examination" on page 861).

If an employee provides insufficient documentation, an employer must still accommodate that employee. However, accommodation in that instance is limited to only that which is supported by the provided documentation. If the documentation does not support any accommodation, employers need not provide any accommodation.[118]

For reasonable accommodations exceeding one year, employers may ask for medical documents substantiating the need for continuing accommodation on a yearly basis.[119]

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[115] 2 CCR sec. 11069(d)(9)-(10)

[116] [illegible]

[117] 2 CCR sec. 11069(d)(5)

[118] 2 CCR sec. 11069(d)(6)

[119] 2 CCR sec. 11069(f)

Physician's Examination

You can require an employee to visit an appropriate health care professional of your choice if the employee provides insufficient documentation from his/her treating physician or other health care professional, to substantiate that he/she has a disability and needs a reasonable accommodation.[120] The examination must be limited to determining the existence of a disability and the functional limitations that require reasonable accommodation. You must pay all costs associated with the visit(s).

Employers must pay all costs associated with their health care provider's examination, and shall allow employees time off to attend the appointment. The employee may use sick time during the time off.

Any medical examination conducted by the employer's health care provider must be job-related and consistent with business necessity. In the case of an applicant or employee requesting accommodation, this means that the examination must be limited to determining the functional limitations that require reasonable accommodation.

You can require that an employee whom you reasonably believe poses a direct threat to other employees be examined by an appropriate health care professional of your choice. You must base a determination of a direct threat on an individualized assessment of the employee's present ability to safely perform the essential functions of the job. You must base this assessment on a reasonable medical judgment that relies on the most current medical knowledge and/or best objective evidence.

If you require physical agility or physical fitness tests, you can ask an employee to have a physician certify if he/she can safely perform the test. Ensure that all fitness tests are job-related and consistent with business necessity.

You are entitled only to the information necessary to determine if the employee can perform the essential functions of the job or work without posing a direct threat. You are not entitled to the employee's entire medical records.

For more information, see "When Medical Exams and Inquiries are Permitted" on page 861.

Confidentiality of Medical Records

Medical information that employers obtain in the interactive process shall be maintained on separate forms and in medical files separate from the employee's personnel file, and must be kept confidential.[121] Employers may only release medical information in the following limited circumstances:

- To inform supervisors and managers of work restrictions or any reasonable accommodations;
- To alert first aid and safety personnel of any conditions that may require emergency treatment; and
- To comply with any government investigation of compliance with FEHA regulations.

When Medical Exams and Inquiries are Permitted

Disability discrimination laws restrict your right to require medical exams or to ask applicants and employees about disabilities. Untimely or unnecessary inquiries about health issues or disabilities leaves you in a vulnerable position if you later take adverse action against the applicant or employee.

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[120] 2 CCR sec. 11069(d)(7)-(8)

[121] 2 CCR sec. 11069(g)

There are three points in time when you can inquire about disabilities or require medical examinations: offer, post-offer and during employment. FEHA provides more protection to employees than does the ADA.

Inform supervisors and safety personnel of job restrictions that are related to a disability, especially when job accommodations are required. Also remind these personnel that employee medical records are confidential.

Medical Examinations and Inquiries

A "medical examination" is a procedure or test that seeks information on an individual's physical or mental impairments or health. When determining if a test or procedure is a medical examination, consider the following:

- Does a health care professional administer the test?
- Does a health care professional interpret the test?
- Is the test designed to reveal a physical or mental health impairment?
- Is the test invasive?
- Does the test measure an employee's performance of a task or measure his/her physiological responses to performing a task?
- Is the test normally given in a medical setting?
- Is medical equipment used?

In many cases, a combination of factors is relevant in determining if a test or procedure is a medical examination. In other cases, one factor can be enough to determine that a test or procedure is medical.

Examples of Medical Examinations

Medical examinations include the following:

- Vision tests that are conducted and analyzed by an ophthalmologist or optometrist
- Blood, urine and breath analyses to check for alcohol use
- Blood, urine, saliva and hair analyses to detect disease or genetic markers for conditions such as sickle cell trait, breast cancer and Huntington's disease
- Blood pressure screening and cholesterol testing
- Nerve conduction tests that screen for possible nerve damage and susceptibility to injury, such as carpal tunnel syndrome
- Range of motion tests that measure muscle strength and motor function
- Pulmonary function tests that measure the capacity of the lungs to hold air and to move air in and out
- Psychological tests that are designed to identify a mental disorder or impairment
- Diagnostic procedures such as x-rays, computerized axial tomography (CAT) scans and magnetic resonance imaging (MRI)

Nonmedical Examinations

You can require procedures and tests that are not typically considered medical examinations, including:

- Tests to determine the current use of illegal drugs.[122] For more information, see "Drugs and Alcohol" on page 831 and "When Drug Testing May Be Permitted" in Chapter 9, page 204.
- Physical agility tests, which measure an employee's ability to perform actual or simulated job tasks
- Physical fitness tests, which measure an employee's performance of physical tasks, such as running or lifting
  - Physical agility and physical fitness tests must not include examinations that could be considered medical, for example, measuring heart rate or blood pressure
- Tests that evaluate an employee's ability to read labels or distinguish objects as part of a demonstration of the ability to perform actual job functions
- Psychological tests that measure personality traits such as honesty, preferences and habits
- Polygraph examinations, but federal and state law do contain prohibitions against polygraph tests (for more information, see "Polygraphs and Lie Detector Tests" in Chapter 8, page 149)

Disability-Related Inquiries

A "disability-related inquiry" is a question or series of questions that is designed to elicit information on a disability. The following list provides examples of disability-related inquiries that are not permitted:

- Asking an employee if he/she has or ever had a disability, how he/she became disabled, or inquiring about the nature or severity of an employee's disability
- Asking an employee to provide medical documentation about the underlying cause of his/her disability

  You can ask an employee to provide documentation that he/she has a disability. For more information, see "Documentation of Disability" on page 859.
- Asking an employee's co-worker, family member, physician, or another person about an employee's disability
- Asking an employee about past addiction to illegal drugs or participation in a rehabilitation program
- Asking about an employee's genetic information
- Asking about an employee's prior workers' compensation history
- Asking an employee if he/she currently is taking any prescription drugs or medications or if he/she has taken any drugs or medications in the past
- Monitoring an employee's use of prescription drugs or medications
- Asking an employee a broad question about his/her impairments to elicit information on a disability, for example, "What impairments do you have?"

The ADA does permit questions that are not likely to elicit information on a disability, such as:

- Asking generally about an employee's well-being, for example, "How are you?"

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[122] 42 U.S.C. 12114(d)(1)

- Asking an employee who looks tired or ill if he/she is feeling okay
- Asking an employee who is sneezing or coughing if he/she has a cold or allergies
- Asking how an employee is doing following the death of a loved one or the end of a marriage or relationship
- Asking an employee about non-disability-related impairments, for example, "How did you break your leg?"
- Asking an employee if he/she can perform a job's functions
- Asking an employee if he/she has been drinking
- Asking an employee about his/her current use of illegal drugs
- Asking a pregnant employee how she is feeling or when her baby is due
- Asking an employee to provide the name and telephone number of a person to contact in case of a medical emergency

Recruiting and Advertising and Disability Related Inquiries

Employers must consider applicants with or without disabilities or perceived disabilities on an equal basis.[123] Employers may not advertise an employment benefit in any way that may discourage applicants with disabilities from applying.

Employers must consider and accept applications from applicants with and without disabilities equally.[124] Employers may not ask questions likely to elicit information about a disability any time before a job offer is made. Examples of unlawful questions include:

- "Do you have any particular disabilities?"
- "Have you ever been treated for any of the following diseases or conditions?"
- "Are you now receiving or have you ever received Workers' Compensation?"
- "What prescription medications are you taking?"
- "Have you ever had a job-related injury or medical condition?"
- "Have you ever left a job because of any physical or mental limitations?"
- "Have you ever been hospitalized?"
- "Have you ever taken medical leave?"

For more information on recruiting and hiring practices, see Chapter 3, "Recruiting and Hiring."

Applications and Job Tests for People With Disabilities

Applications and job tests must comply with the ADA and FEHA.

You must accept and consider applications from disabled persons equally with applications from nondisabled persons. Both the EEOC and the DFEH closely scrutinize tests for job applicants to determine if the tests are job-related. The EEOC and DFEH will also examine any test for a promotion that an employer gives to an employee with a disability if the employer does not give the same test to a person without a disability.

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[123] 2 CCR sec. 11070

[124] 2 CCR sec. 11070(b)

You can give job-related tests that accurately measure the applicant's job skills or aptitude, rather than reflecting the individual's disability. You must provide reasonable accommodation for a disabled applicant when he/she takes the test.

Employers may not use employment tests that screen out or tend to screen out individuals with disabilities unless the test is job-related for the position and consistent with business necessity. For example, an employer may only test an applicant's physical agility or strength if the position requires a worker to use those capabilities.[125] Employers may not use qualification standards based on an applicant's uncorrected vision or hearing unless those criteria are shown to be job-related for the position in question and are consistent with business necessity.

Job testing sites must be accessible to all applicants and must accommodate all disabled applicants.[126] Examples may include:

- Giving a visually impaired applicant's test in Braille, asking a person to read for the applicant, or giving the applicant an oral examination.
- Giving quadriplegic individuals an oral examination or having someone write the answers for them.
- Providing an interpreter to applicants with a hearing impairment.
- Offering additional time to applicants whose disabilities interfere with their abilities to read, process information, or communicate.
- Modifying tests or offering individualized assessments. Employers may wish to consult an expert prior to modifying a test.
- Allowing the use of readers, interpreters, or similar supportive persons.

Medical Examinations and Inquiries Prior to Offer of Employment

Prior to an offer of employment, the ADA and FEHA generally prohibit all disability-related inquiries and medical examinations, even if they are related to the job.

At the offer stage, you cannot:[127]

- Require any medical or psychological examination of an applicant
- Make any medical or psychological inquiry of an applicant
- Make any inquiry about whether an applicant has a mental disability, physical disability or medical condition
- Make any inquiry about the nature or severity of a physical disability, mental disability or medical condition

However, at the offer stage you are permitted to:[128]

- Inquire into the ability of an applicant to perform essential functions of the job
- Respond to an applicant's request for reasonable accommodation

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[125] 2 CCR sec. 11077

[126] 2 CCR sec. 110[illegible]

[127] Govt. Code sec. [illegible]

[128] Govt. Code sec. 12940(e)

Prohibited medical examinations do not include testing for current illegal drug use.

If an applicant requests reasonable accommodation, or if an applicant has an obvious disability and you have a reasonable belief that he/she may require accommodation, you may make limited inquiries regarding the reasonable accommodation (see "Disability-Related Inquiries" on page 863).

At the offer stage, you cannot inquire about an applicant's workers' compensation history. Neither increases in workers' compensation premiums nor medical benefit costs constitute a legitimate basis for denying a job opportunity to a qualified disabled person.

Medical Examinations and Inquiries Post-Offer/Pre-Employment

California and federal law require employers to postpone job applicants' medical examinations until after they make a job offer and the applicant satisfies all other employment conditions. After an applicant receives a conditional job offer, but before he/she starts work, you can inquire about disabilities and conduct medical and psychological examinations, if:[129]

- The examination or inquiry is job-related and consistent with business necessity
- All entering employees in the same job classification are subject to the same examination or inquiry

California's disability regulations state that an employer may condition a bona fide job offer on the results of a medical examination in order to determine fitness for the particular job. To be a "bona fide job offer," the employer must have completed all non-medical components of the application process, or demonstrate that it could not reasonably have done so prior to the offer.[130] Additionally:

- All entering employees in similar positions must be subject to similar examinations;
- Where the results of an examination would result in the disqualification of the applicant for employment, the applicant must have the opportunity to submit his or her own independent medical opinions for consideration; and
- The results of any medical examinations must be maintained in a separate confidential medical file.

The timing of a medical examination is important. In *Leonel v. American Airlines*, the employer allowed candidates to take early medical examinations. The company made conditional offers of employment, contingent upon passing background checks and medical examinations. Rather than wait for the background checks, the employer immediately sent the applicants for medical examinations, during which the applicants failed to disclose HIV-positive status or related medications. When the company discovered the applicants' HIV-positive status, the company rescinded the job offers, citing the applicants' failure to disclose information during their medical examinations.

The applicants sued in federal court, alleging that the ADA and FEHA prohibit the company from requiring disclosure of medical information until the medical examination remained the only contingency. They also said that the company violated their right to privacy under the California Constitution by conducting complete blood count tests on their blood samples without notifying them or obtaining their consent. The Ninth Circuit Court of Appeals agreed that the applicants were entitled to present the issues at a trial.[131]

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[129] Govt. Code sec. 12940(e)

[130] 2 CCR sec. 11071(b)

[131] *Leonel v. American Airlines, Inc.*, 400 F.3d 702 (9th Cir. 2005)

Withdrawing an Offer

An employer may withdraw an offer of employment only if the results of a medical or psychological examination indicate that the applicant is unable to perform the essential functions of a job or would endanger the health or safety of the workplace, with or without reasonable accommodation.[132]

Medical Examinations and Inquiries During Employment

Both federal and state law restrict an employer's ability to make disability-related inquires or require medical examinations during employment.

During employment, you cannot:[133]

- Require any medical or psychological examination of an employee.
- Make any medical or psychological inquiry of an employee.
- Make any inquiry as to whether an employee has a mental disability, physical disability or medical condition.
- Make any inquiry about the nature or severity of a physical disability, mental disability or medical condition.

However, you can require any examinations or inquiries that are job-related and consistent with business necessity. The EEOC explains that a disability-related inquiry or medical examination may be "job-related and consistent with business necessity" when:

- You have a reasonable belief, based on objective evidence, that a medical condition will impair an employee's ability to perform essential job functions.
- You have a reasonable belief, based on objective evidence, that an employee will pose a direct threat to co-workers' safety due to a medical condition.
- The examination or inquiry is part of a request for reasonable accommodation when the disability or need for accommodation is not known or obvious.
- The examination or inquiry is performed in connection with periodic medical examinations and other monitoring under specific circumstances.
- You know about a particular employee's medical condition, have observed performance problems and can reasonably attribute the problems to the medical condition.
- A credible third party gave you reliable information that an employee suffers from a medical condition.
- Based on objective evidence, you observe symptoms that indicate that an employee may suffer from a medical condition that impairs his/her ability to perform essential job functions or poses a direct threat to the safety of others.

California's disability regulations define "job-related" as "tailored to assess the employee's ability to carry out the essential functions of the job or to determine whether the employee poses a danger to the employee or others due to disability."[134] The regulations further define "business necessity" as "vital" to the business.[135]

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132. 2 CCR sec. 11071(b)(3)
133. Govt. Code sec. 12940(f)
134. 2 CCR sec. 11065 (k)
135. 2 CCR sec. 11065 (b)

Whether a fitness for duty exam will be appropriate must be examined in each and every circumstance to determine if it is truly job related and consistent with business necessity, given the particular employee's actual job duties.

Example of Appropriate Fitness-for-Duty Exam

Fitness-for-duty exams are lawful in certain situations, but employers should be cautious and know the rules.

In a 2014 case, *Kao v. University of San Francisco*, a professor at the University of San Francisco was terminated because he refused to participate in a fitness-for-duty exam after he showed increasingly "frightening" behavior. He sued the university on various grounds, including violation of the California Fair Employment and Housing Act, which prohibits disability discrimination.[136]

A California court of appeal affirmed that the employer had the right to seek a fitness-for-duty exam because, under the facts of this case, the exam was job-related and consistent with business necessity.

Dr. John Kao was a tenured professor of mathematics at the University of San Francisco (USF). In about 2008, Kao began displaying increasingly bizarre and intimidating behavior. The behavior was described as follows:

- A "sudden change to complete irrational, uncontrollable rage ... "
- He shouted and screamed; went on uncontrolled rants; clenched his fists; seemed tense, agitated and angry; was physically intimidating; shook with anger; had a "wild cackling laugh;" showed moments of instantaneous rage; glared at people; and other concerning and upsetting behaviors.
- He was physically confrontational with other professors, including forcefully bumping into them and charging toward them but moving at the last second.

A dean at USF described one incident where Kao became enraged because she asked how his ill mother was doing: "He kind of clenched his jaw and he looked mean and mad and he got right in my face and said 'Fine. Fine. How are you and how are your children doing?'" She got in her car and saw him "standing here with clenched fists glaring at me, like leaned over looking at me angrily ... I was really scared."

The wife of a professor also experienced Kao's rage when she asked about his ill mother: "He got in her face and very close to her and again rigid with anger and raised his voice and said, 'How's your mother? How's your mother? How's your mother?'" in a "startling frightening way."

After receiving various complaints, USF began an investigation and received reports from colleagues that they felt threatened, and feared that Kao would become violent and harm himself or others.

The university consulted experts, including a forensic psychiatrist specializing in workplace threat assessments who recommended that USF conduct an independent medical exam to determine if Kao could do his job in a safe way. On this recommendation, USF contacted a doctor to set up an exam for Kao. USF instructed the doctor not to provide them with any medical diagnosis or other clinical information, but only to inform them whether or not Kao was fit-for-duty.

USF tried several times to arrange the exam with Kao and his attorney, but Kao refused to participate. Ultimately, USF terminated Kao, and Kao sued.

Kao's main contention in appealing the jury verdict against him was that USF should not have required the fitness-for-duty exam and should have first engaged in an interactive process with him. The court disagreed.

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[136] *Kao v. University of San Francisco*, 229 Cal.App.4th 437 (2014)

USF, according to the court, had the right to call for a fitness-for-duty exam because it was job-related and consistent with business necessity.

Here, the jury had "ample evidence" available to reach a finding that the exam was necessary to determine whether Kao posed a workplace danger and that it was vital to the business. Multiple people reported multiple instances of threatening behavior, and the decision to require the exam was based on the unrefuted advice of experts in the field of workplace threat assessment. The jury heard testimony that Kao frightened school personnel and that his behavior caused "fear and confusion."

Moreover, under California law, USF has an unquestionable duty to maintain a place where people can safely work; a fact the threat assessment experts emphasized to the university.

Examples of Improper Medical Inquiries

Asking an employee for an underlying general diagnosis, either to justify the employee's entitlement to leave/accommodation or to allow an employee to return from a disability leave, may be an impermissible inquiry.

Instead, permissible inquiries focus on whether the employee can perform the essential functions of the job.

For example, in *Conroy v. New York State Department of Correctional Services*, the employer demanded that the employees provide a medical certification including a brief general diagnosis with enough information "to allow the company to make a determination concerning the employee's entitlement to leave, or to evaluate the need to have an employee examined by [employee health services] prior to returning to duty."

The employees claimed this requirement violated the ADA because the law prohibits an employer from making inquiries about a disability or about the nature and severity of a disability unless it is job-related and a business necessity.[137]

The employer argued that its requirement did not constitute an unlawful inquiry because it required only a general diagnosis. The court rejected the employer's argument, finding that even what the employer referred to as a "general diagnosis" might reveal a disability.[138]

In another case, *EEOC v. Dillards*, a federal district court found that an employer's policy requiring a doctor's note to excuse a health-related absence violated the ADA because the employee was required to submit a note stating "the nature of the absence (such as migraine, high blood pressure, etc.)." The policy applied to all employees with health-related absences. The court found that the policy invited intrusive questioning into the employee's medical condition and tended to elicit information regarding an actual or perceived disability in violation of the ADA.

There was no evidence that the requirement was job-related and consistent with business necessity. According to the court, if the medical provider verifies in writing that the employee has a medical condition which requires him/her to be out of work and specifies when the employee may return, there is no need for the employer to know the underlying medical condition.[139]

For more information, see "Documentation of Disability" on page 859.

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[137] 42 U.S.C. 12112(d)(4)(a)

[138] *Conroy v. New York State Department of Correctional Services*, 333 F.3d 88 (2nd Cir. 2003)

[139] *EEOC v. Dillards*, 2012 WL 440887 (S.D. Cal. 2012); see also *Indergard v. Georgia-Pacific Corporation*, 582 F.3d 1049 (9th Cir. 2009)

Employee Health and Wellness Programs and Disability-Related Inquiries and Examinations

You can conduct voluntary medical examinations, including voluntary medical histories, which are part of a voluntary wellness program available to employees at that worksite.[140]

Examples include:

- Blood pressure screening
- Cholesterol testing
- Glaucoma testing

Employers need not demonstrate that such programs are job-related or consistent with business necessity, as long as the program is voluntary. A wellness program is not voluntary if employers penalize employees who do not participate.[141]

All medical records must be kept confidential and separate from personnel records.

The federal Equal Employment Opportunity Commission has indicated that certain aspects of wellness programs can render those programs involuntary — such as financial penalties or increased premiums. Between August and October of 2014, the EEOC brought lawsuits against three companies alleging that their wellness programs violate federal laws, including the ADA and GINA.

For example:

- A company shifted the entire cost of an employee's medical premium to the employee after she declined to participate in a wellness program that included a health risk assessment, medical history information and blood work. The EEOC alleged that the questions in the program constituted medical examinations and inquiries, and that they were was not job-related and consistent with business necessity. Additionally, the EEOC alleged that the financial and employment penalties (nearly $500/month in additional health insurance expenses and the risk of termination) for non-participation rendered the wellness program involuntary and, therefore, unlawful.
- Employees who completed a testing and risk assessment as part of a company's wellness program were only required to pay 25 percent of their premium costs. Employees who did not participate allegedly had their health care benefits canceled, and had to pay their own premiums through COBRA. In addition, the wellness policy allegedly stated that non-participating employees were subject to unspecified "disciplinary action." Again, the EEOC alleged that the penalties rendered the program involuntary and the medical inquiries were not job related and consistent with business necessity.
- Employees at a company allegedly were assessed a $500 surcharge on healthcare premiums if they refused to participate in a wellness program and could lose up to $1,500 in employer contributions to their health savings accounts. The EEOC alleged ADA violations and that the requested blood test may violate federal laws prohibiting discrimination based on genetic information.

EEOC attorneys have stated that employers may "certainly" have voluntary wellness programs, but to avoid challenge, those programs must truly be voluntary. Employers, according to the EEOC, cannot force employees to choose between non-job-related medical exams and inquiries, and financial hardship or even termination.

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[140] Govt. Code sec. 12940(f)(2)

[141] 2 CCR sec. 11071(d)(4)

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In 2015, the EEOC published two separate Notices of Proposed Rulemaking (NPRM) describing how the ADA and GINA apply to employer wellness incentive programs that are part of group health plans. According to the EEOC, the proposed ADA rule is intended to provide guidance as to how wellness programs offered as part of an employer's group health plan can comply with the ADA and also be consistent with provisions in the Health Insurance Portability and Accountability Act (HIPAA), as amended by the Affordable Care Act.

The proposed GINA rule is also intended to address employer wellness incentive programs and limitations on gathering health information. These proposed regulations specifically address the use of wellness incentives for an employee's spouse who is covered under an employer's plan.

Both of these rulemaking proposals are still pending. For more information, see "Wellness Programs" in Chapter 17, page 463.

Wellness programs may also lead to concerns over privacy and confidentiality of employee medical information. Use of such tools as "activity trackers" may lead to problems. Employers who monitor the information recorded on employees' activity trackers may be collecting confidential medical information. It's one thing for an employer to view how many steps an employee takes in a day; it's another to see an employee's log of blood pressure, heart rate, and cholesterol numbers. The latter examples constitute protected medical information, and employers have an obligation to keep that data confidential and prevent improper dissemination.

Wellness programs are an area of increased attention and enforcement by federal agencies. This is a rapidly changing area of the law. Employers who have questions regarding implementation of their wellness programs should seek the advice of counsel.

In addition to voluntary wellness program requests, an Employee Assistance Program counselor may ask an employee seeking help about any physical or mental conditions the employee has if the counselor:

- Does not act on behalf of the employer
- Is obligated to keep employee information confidential from the employer
- Has no power to affect employment decisions
- Discloses these provisions to the employee[142]

Finally, an employer may make disability-related inquiries and require employees to submit to medical examinations when required by federal or state laws or regulations. For example, federal safety regulations require regular medical examinations of interstate bus and truck drivers.

Medical Examinations and Inquiries When the Employee Is an Applicant

Under the ADA and FEHA, treat an existing employee who applies for a different job in your company as an applicant. You cannot ask disability-related questions or require a medical examination before making the individual a conditional offer. After you make an offer, an examination or inquiry must be job-related and consistent with business necessity.

An individual is not an applicant if he/she is non-competitively entitled to another position with the same employer because of seniority or satisfactory performance in his/her current position. An individual who is temporarily assigned to another position and then returned to his/her regular job is also not an applicant. These individuals are employees. You can only make a disability-related inquiry or require a medical examination that is job-related and consistent with business necessity.

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[142] 2 CCR sec. 11071(d)(3)

Medical Information From Third Parties

Under the ADA, you can make disability-related inquiries or require a medical examination if you learn about an employee's or applicant's medical condition from another person. The information must be reliable and create a reasonable belief that the employee's ability to perform essential job functions will be impaired by a medical condition or that he/she will pose a direct threat to the safety of others due to a medical condition.

In assessing if information that you learned from another person justifies asking disability-related questions or requiring a medical examination, consider the following:

- The relationship of the employee to the person who is providing the information
- The seriousness of the alleged medical condition
- The possible motivation of the person who is providing the information
- How the person learned the information, for example directly from the employee in question or from someone else
- Other evidence that relates to the information's reliability

FEHA does not address if you can act on information from another person. However, FEHA does allow you to require examinations and inquiries that are job-related and consistent with business necessity. If reliable information from a third person raises issues of whether an employee can perform essential job functions, you could probably inquire about the alleged disability.

California's disability regulations impose an obligation on employers to initiate the interactive process for reasonable accommodation if a third party informs the employer of the need for accommodation.[143]

Disability Claims, Enforcement and Penalties

In addition to disability discrimination claims, individuals can bring claims for failure to accommodate harassment, retaliation and intimidation under the ADA. This section provides some court cases to illustrate the different claims.

Failure to Accommodate Claims

Failure to reasonably accommodate an employee is unlawful, and an employee may be able to recover damages unless the employer can demonstrate undue hardship, as defined by the law.[144] An employee can also bring a claim for failure to engage in the interactive process, which is a separate claim.[145]

New 2016

Legislation effective January 1, 2016 specifically clarifies that, under FEHA, the mere act of requesting a reasonable accommodation is protected activity, and an employer cannot discriminate or retaliate against a person for requesting the accommodation — regardless of whether the request was granted.[146]

If you fail to provide a disabled employee with reasonable accommodation and that failure results in an injury, the employee may be able to recover damages for that injury under FEHA.

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[143] 2 CCR sec. 11069(b)(2)

[144] Govt. Code sec. 12940(m)

[145] Govt. Code sec. 12940(n)

[146] Govt. Code sec. 12940(m)(2)

The case *Bagatti v. Department of Rehabilitation* was brought by a disabled employee against the California Department of Rehabilitation. The employee suffered disabilities resulting from her prior affliction with polio. She requested certain accommodations to help her overcome difficulties moving in and about the workplace. When the employer refused, she filed a complaint with the DFEH about the employer's failure to accommodate. She then suffered physical injury and alleged that it resulted from the state agency's failure to accommodate her disability.

The employer argued that the employee could not file a lawsuit for physical injury because the employee was protected by workers' compensation law. The court disagreed. It ruled that because her physical injury claim could be related to the employer's failure to accommodate her disability, which is an unfair employment practice under FEHA, she should have a trial to prove if her injury resulted from that failure.[147]

Timely Complaint

An employee whose request for accommodation is rejected by an employer must make a timely complaint to the appropriate enforcement agency, or the claim is barred. In *Cherosky et. al. v. Henderson*, an employer refused to provide respiratory protection equipment to several employees. The court ruled that the employees' lawsuits were properly dismissed because they had not initiated them within the allotted time period from the date the request for accommodation was denied.[148]

The Ninth Circuit Court of Appeals distinguished this situation from one in which a chain of related unlawful events of an ongoing unlawful pattern or practice extends the time limits during which an employee can file a claim. For more information, see "Filing a Discrimination Claim Under Federal Law" in Chapter 26, page 756. *Cherosky* involves a claim under the federal Rehabilitation Act.

Disability Harassment Claims

An employee who experiences workplace harassment because of a disability can file a claim under the ADA. In *Fox v. General Motors Corp.*, the court ruled that the ADA supports a claim of hostile environment harassment based on an employee's disability.[149]

Robert Fox claimed that supervisors and co-workers at General Motors in West Virginia harassed him due to his non-work-related back injury. His supervisors used profane language, berated him for his inability to perform certain tasks, deliberately assigned him work beyond his medical restrictions, instructed other employees not to speak to disabled employees and refused to allow him to test for another position in the company.

The court found that Fox was entitled to file a harassment claim under the ADA, which prohibits discrimination against a qualified individual with a disability.[150] Although the decision by a lower federal court outside of California does not have jurisdiction in California, it is likely our Ninth Circuit Court of Appeals would also allow disability harassment claims.

Disability Retaliation and Interference Claims

The ADA prohibits discrimination against an individual because he/she opposed a practice that the ADA prohibits or because he/she made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing under the ADA.[151] The ADA further prohibits employers from interfering with the exercise of protected ADA rights. FEHA also protects individuals from discrimination and/or retaliation for asserting protected disability rights.[152]

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[147] *Bagatti v. Department of Rehabilitation*, 97 Cal. App. 4th 344 (20

[148] *Cherosky et. al. v. Henderson*, 330 F.3d 1243 (9th Cir. 2003)

[149] *Fox v. General Motors Corp.*, 247 F.3d 169 (4th Cir. 2001)

[150] 42 U.S.C. 12112

[151] 42 U.S.C. 12203(a)

In *Barnett v. U.S. Airways, Inc.*, the Ninth Circuit Court of Appeals adopted the U.S. Supreme Court's "burden shifting" analysis to determine when an individual has been the victim of retaliation.[153] Using burden shifting, when an employer shows a legitimate reason for taking an adverse action against an employee, the burden shifts to the employee to prove that the reason that the employer gave was a pretext for an unlawful act.[154]

According to the Ninth Circuit Court of Appeals, the ADA's anti-interference provision permits a finding of liability that places an easier burden of proof on a plaintiff. The ADA makes it unlawful to coerce, intimidate, threaten, or interfere with the exercise of protected rights.[155] In *Brown v. City of Tucson*, Brenda Brown suffered from severe depression and requested accommodations from her employer, Tucson city government, that relieved her of certain duties as a police officer. Following her termination for failing to meet performance standards, she complained that the adverse actions of several of her supervisors violated the anti-retaliation provision of the ADA and constituted unlawful interference with her rights in violation of the anti-interference provision of the ADA.

The court held that Brown could not prevail in her retaliation claim because she could not prove that her failure to meet performance standards was a pretext for her termination. However, the court approved the interference claim because the supervisor's conduct did amount to intimidation and coercion. As a result, Brown won compensatory and punitive damages against her employer despite having cause for her termination.[156]

Disability Association Claims

Under California's FEHA, employers cannot discharge or discriminate against an employee because of his/her own disability and because of his/her association with a person who has, or is perceived to have, a disability.[157] The same association protection exists under the ADA.

Employees' relationships with qualifying individuals are protected under the association provision. You cannot terminate employees because of this relationship.[158] "Association," according to the EEOC, does not require a family relationship for an individual to be protected. The key is whether the employer is motivated by the individual's relationship or association with a person who has a disability.

For example, in *Trujillo v. Pacificorp*, two long-term employees of Pacificorp used their health care benefits to pay for their son's medical care after he suffered a brain tumor. Shortly after their son suffered a relapse, the employees were investigated for timecard discrepancies and ultimately terminated. The employees claimed they were terminated because of their association with their disabled son and the company's concern about rising health care costs.

The Tenth Circuit Court of Appeals agreed that Pacificorp violated the ADA's association provision. The court noted that Pacificorp progressively disciplined other employees who had committed similar offenses, while they terminated these two particular employees. The court also noted that Pacificorp did not conduct a fair investigation.[159]

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[152] Govt. Code secs. 12940(h),(n)

[153] *Barnett v. U.S. Airways, Inc.*, 228 F.3d 1105, 1121 (9th Cir. 2000)

[154] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)

[155] 42 U.S.C. 12203(b)

[156] *Brown v. City of Tucson*, 336 F.3d 1181 (9th Cir. 2003)

[157] Govt. Code, secs. 12940(a) and 12926(n)

[158] 42 U.S.C. 12112(b)(4)

[159] *Trujillo v. Pacificorp*, 524 F.3d 1149 (10th Cir. 2008)

A California court ruled that an employee who requested a leave of absence to donate a kidney to his sister can pursue a claim that he was discriminated against based on his association with a disabled person. Until this case, California courts had not directly addressed the issue of discrimination against a nondisabled employee because of that employee's association with an individual with a disability.[160]

The California court looked to a key federal case, *Larimer v. International Business Machines Corp.*, for guidance. *Larimer* delineated three types of situations which can give rise to a claim for associational disability discrimination:[161]

- Expense situations: The employee is discriminated against because his/her spouse or other relative has a disability that is costly to the employer.
- Disability association situations: The employee is discriminated against because the employer fears that the employee may end up physically affected by the disability of the person they are associated with. For example, the employee's spouse has HIV, and the employer fears the employee will become infected, or the employee's twin has a genetic condition and the employer fears the employee will also develop the condition.
- Distraction situations: The employee is discriminated against because the employer fears the employee will be inattentive at work because of the disability of the person he/she is associated with. For example, the employee's child has cancer and the employer fears the employee will be distracted.

Here, the employee alleged that his claim fell into the "expense" situation; he claimed that he was not fired because of poor performance, but because the company did not want to deal with the expense or potential expense of his leave to donate the kidney. The court agreed and determined that the company fired the employee preemptively to avoid an expense stemming from the employee's association with his physically disabled sister.

The court noted that both the ADA and FEHA should be construed broadly toward employee protection. The employee was allowed to take his discrimination case to trial.

Note that employers are also now required to provide organ donor leave, but this law was not in effect at the time the employee was fired and did not apply retroactively. For more information, please see "Rights of Employees Related to Organ and Bone Marrow Donation Leave" in Chapter 22, page 594.

ADA and FEHA Remedies and Enforcement

The EEOC administers the ADA. The DFEH administers FEHA.

Remedies that are available under the ADA and FEHA are designed to prevent future employer discrimination, and to make "whole" the individual or class subject to the discrimination.These remedies include compensatory and punitive damages for willful or intentional violations, reinstatement, back pay and reasonable attorneys' fees and costs.

Generally, procedural rules applicable to claims for other types of discrimination apply to claims for disability discrimination. The ADA also encourages informal resolution of claims through mediation and arbitration.

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[160] *Rope v. Auto-Chlor System of Washington, Inc.*, 220 Cal.App.4th 635 (2013)

[161] *Larimer v. International Business Machines Corp.*, 370 F.3d 698 (7th Cir. 2004)

Disability Leave

State and federal disability laws require covered employers to reasonably accommodate the disability of any individual if the employer knows of the disability unless the employer can demonstrate that the accommodation would impose an undue hardship.

Reasonable accommodation includes:

- Reassignment to a vacant position
- Part-time or modified work schedules
- An unpaid extension of a paid or unpaid leave

The following table provides a broad overview of disability leave requirements:

Disability leave issue	**Requirement**
Covered employers	State disability discrimination laws apply if you employ five or more employees. Federal law (the ADA) applies if you employ 15 or more employees.
Maximum amount of leave	You may have to extend leave as a reasonable accommodation. You must make a reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability unless you can show that the accommodation would cause an undue hardship on the operation of your business.
Employee eligibility	An employee who is disabled and can perform the essential functions of his/her job is eligible. See "'Essential Job Functions' Defined" on page 846.
Reasons for leave	The disabled employee needs modified work or a period of leave for reasons related to his/her disability.
Requirements for paid leave	You should allow an employee with a disability to exhaust paid leave first and then provide unpaid leave. The employee who is disabled may be entitled to State Disability Insurance (SDI). You do not have to provide paid leave beyond that which is given to similarly situated employees.
Employer responsibilities	When you learn that an employee has a disability that may require reasonable accommodation, engage in the interactive process to determine a reasonable accommodation.
Ending the employment relationship before the leave expires	The employee has no greater rights than he/she would have if he/she were not disabled. The right to reinstatement would end if the employment relationship ends. However, you should consult with legal counsel before terminating an employee who is disabled.

Controlling Disability Leave

Very little definitive guidance exists on the length of time off you are "required" to provide for disability leave. Each situation is unique and depends on the employee's circumstances, the essential functions of the job and the accommodation requested.

Employers with blanket policies regarding unpaid leave may run afoul of their obligations to reasonably accommodate an employee with disabilities. If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must provide the employee with the additional leave even if the employer has a "no-fault" policy, under which employees are automatically terminated after they are on a leave for a certain period of time. For more information, see "Extended Disability Leave as a Reasonable Accommodation" on page 853.

An employer, however, does not need to provide leave if: (1) it can provide an effective accommodation that allows the person to keep working; or (2) it can show that granting additional leave would cause an undue hardship. If an employee can perform work with a reasonable accommodation other than a leave of absence, an employer may not require that the employee take a leave of absence.[162] Employers are also not required to provide indefinite leaves of absence as a reasonable accommodation.[163]

If you have more than 50 employees and the employee is eligible, you can designate the leave as FMLA/CFRA for up to the maximum of 12 weeks in a 12-month period. For more information, see Chapter 18, "Family and Medical Leave."

California's disability regulations clarify that extending a leave of absence beyond that time provided by a mandatory leave law, such as FMLA or CFRA, may be a reasonable accommodation.

Although an extension of paid or unpaid leave is a form of reasonable accommodation for a disability, questions often arise about whether the extension qualifies as "reasonable." A reasonable accommodation is any appropriate measure that allows an employee with a disability to perform the essential functions of his/her job. A modified or reduced work schedule and time off from work are examples of reasonable accommodation.

But no clear guidance exists on the definition of reasonable accommodation. What works for one employer in terms of a reduced work schedule, leave of absence or other accommodation may not be feasible for another. Review each request for leave as a reasonable accommodation for a disability and base your determination on the specific circumstances.

Handling an Employee's Return to Work From Disability Leave

Generally, when an employee returns to work after a disability leave, you must reinstate the employee to the job he/she held before leave.

If holding the position open while the employee is on leave would create an undue hardship, you must consider the employee for a vacant, equivalent position for the duration of the leave, then reinstate him/her to that position when the need for leave ends.

You can also require that the employee obtain a release to return to work from his/her health care provider stating that he/she is able to resume work. However, require a release only if you apply this practice uniformly or maintain a policy of requiring releases from other employees returning to work after illness, injury, or disability.

Employers may not impose a "100 percent healed" or "fully healed" policy on employees before they can return to work after an illness or injury.[164] Employers must assess individually an employee's ability to perform the essential functions of his job.

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[162] 2 CCR sec. 11068(c)

[163] 2 CCR sec. 11068(c)

[164] 2 CCR sec. 11068(i)

Certification of Health Care Provider for Employee Return to Work

If the employee can no longer perform the essential functions of his/her job, reasonable accommodation might include transfer to a different job or schedule. Simply because the employee is able to return to work does not relieve you from your ongoing reasonable accommodation obligations if the employee has such need. For more information on reasonable accommodations, see "Reasonable Accommodation of Disabilities" on page 847.

Refusing Reinstatement After Disability Leave

If you believe that an employee will pose a threat to his/her own safety or the safety of others, consult legal counsel before taking any action to terminate the employee. Although you can refuse to reinstate an employee on these grounds, use caution. For more information, see "Direct Threat to Health or Safety of Others" on page 857.

Further Information

The following state and federal resources are available to learn more about disabilities, FEHA and the ADA.

EEOC and the ADA

The EEOC has prepared documents that can help you understand how to comply with the ADA and how the ADA is enforced. Many of the documents are in a question and answer format.

- *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act*, available at www.eeoc.gov/policy/docs/guidance-inquiries.html
- *Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act*, available at www.eeoc.gov/policy/docs/qanda-inquiries.html
- *Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations*, available at www.eeoc.gov/policy/docs/preemp.html
- *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, available at www.eeoc.gov/policy/docs/accommodation.html
- *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, available at www.eeoc.gov/policy/docs/psych.html
- Fact sheet on disability-related inquiries to prepare for an emergency evacuation, available at www.eeoc.gov/facts/evacuation.html
- *Enforcement Guidance on the Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms*, available at www.eeoc.gov/policy/docs/guidance-contingent.html

National Institute on Disability and Rehabilitation Research

Congress mandated the National Institute on Disability and Rehabilitation Research to establish 10 regional centers to help employers, people with disabilities and other entities with responsibilities under the ADA. The centers act as a central source of information, direct technical assistance, training and referral on ADA issues in employment, public accommodations, public services and communications.

The center serving California, Arizona, Hawaii and Nevada is:

Pacific Coast Disability and Business Technical Assistance Center
555 12th Street, Suite 1030
Oakland, CA 94607-4046
(800) 949-4232 (voice and TTY)
(510) 285-5600 (local voice and TTY)
www.adapacific.org

Office of Disability Employment Policy

A division of the federal Department of Labor, the Office of Disability Employment Policy (ODEP) administers programs to further the employment of disabled individuals. ODEP also offers technical assistance materials.

Contact ODEP at:

Office of Disability Employment Policy
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210
(866) 633-7365 (voice)
(877) 889-5627 (TTY)
www.dol.gov/odep

Job Accommodation Network

The Job Accommodation Network (JAN) is a branch of ODEP. JAN offers free consulting for employers who face specific challenges in accommodating disabled individuals in the workplace. Call JAN's hotline at (800) 526-7234 (voice) or (877) 781-9403 (TTY), or visit JAN's website at http://askjan.org.

Access Board

The Access Board is an independent federal agency that is devoted to accessibility for people with disabilities. The Access Board offers copies of the access standards that is has developed for the ADA. Call (800) USA-ABLE (800) (voice) or 993-2822 (TTY), or visit the Access Board website at www.access-board.gov.

Office of the ADA

The Office of the ADA is part of the U.S. Department of Justice (DOJ). The Office of the ADA operates an information line about disabilities laws. Call (800) 514-0301 (voice) or (800) 514-0383 (TTY) or visit the ADA website at www.ada.gov/.

California Department of Rehabilitation

The California Department of Rehabilitation serves as the state's lead agency in implementing the ADA. The phone number for its special ADA task force unit is (916) 558-5755. Visit the Department of Rehabilitation website at www.dor.ca.gov/.

California Committee on Employment of People With Disabilities

The California Committee on Employment of People With Disabilities offers the following publications

- *Language Guide on Disability* — How to say what you mean.

Submit requests for this publications in writing to:

California Committee on Employment of People With Disabilities
721 Capitol Mall
Sacramento, CA 95814

Include the publication's name and the quantity desired.

Disciplining and Terminating At-Will Employees

Making and carrying out a decision to discipline or terminate an employee are two of the most difficult tasks supervisors or managers face. This section helps you make sound decisions about employee performance and behavior. It also helps you avoid legal pitfalls when it becomes necessary to discipline or terminate an employee.

Though at-will employees may be terminated at any time and for any reason, employers may want to consider some general best practices related to disciplinary decisions and termination.

This chapter also discusses the current status of at-will employment in California, including actions employers themselves often take that modify that relationship. It reviews laws, regulations and court decisions that require the attention of managers and HR administrators who are seeking to avoid wrongful termination claims and lawsuits. The chapter discusses policies and procedures you can follow to reduce the likelihood that any claims against you will be successful.

Categories of Disciplinary Issues

Employers often divide violations into categories, differentiating between behavioral and performance issues and issues that involve dishonesty. Attendance problems are often treated as a distinct matter, particularly when you maintain an absenteeism control policy that tracks days off work.

In general, you can divide violations into the following categories covered in this topic:

- Performance and Conduct
- Dishonesty and Related Problems
- Attendance
- Absenteeism and Tardiness

Performance and Conduct

The words “can’t” and “won’t” can help you determine if you are dealing with a performance problem or a conduct issue. For example, if an employee makes frequent errors but is trying to do the job (“can’t”), it is likely that he/she is having performance issues. An example of a conduct problem is when an employee flatly refuses to complete assigned work or follow company policy (“won’t”).

Conduct Issues

- Intoxication at work
- Insubordination
- Horseplay or fighting
- Smoking in unauthorized places
- Gambling on company premises
- Failure to use safety devices
- Failure to report injuries

- Carelessness
- Sleeping on the job
- Possession of drugs or alcohol
- Possession of firearms or other weapons
- Harassment, discrimination or retaliation
- Violation of company policy
- Violence or threats of violence

Work Performance

- Not completing work assignments
- Poor quality product or service
- Insufficient productivity or failing to meet organization standards

Dishonesty and Related Problems

- Theft
- Falsifying an employment application
- Willfully damaging company or co-workers' property
- Falsifying time records (either employee's own or those of another employee)
- Falsifying business records

Absenteeism and Tardiness

Absenteeism and tardiness present two of the most frequent and difficult employee behaviors to discipline. Supervisors must often make judgments about the relative justification for absences or tardiness, which can be influenced by the employee's reliability, longevity and general performance.

Common problem areas include:

- Unexcused absence
- Chronic absenteeism
- Unexcused or excessive tardiness
- Leaving without permission

Many companies adopt objective absenteeism standards that clearly state the number of acceptable days and incidents permissible in a given time period. Although some subjectivity may determine if a particular incident should be charged against the employee, using objective measures helps to ensure that your attendance policy is applied uniformly.

Some absences are protected by law, including:

- The federal Family and Medical Leave Act (FMLA). For more information, see Chapter 18, "Family and Medical Leave."
- The California Family Rights Act (CFRA). For more information, see Chapter 18, "Family and Medical Leave."

- Pregnancy Disability Leave (PDL). For more information, see Chapter 19, "Pregnancy Disability Leave (PDL)."
- The Americans with Disabilities Act (ADA) and Fair Employment and Housing Act (FEHA). For more information, see "Laws Protecting Employees With Disabilities" in Chapter 28, page 827.
- California's paid sick leave (PSL). For more information, see Chapter 20, "Paid Sick Leave."
- Workers' Compensation. For more information, see Chapter 25, "Workers' Compensation."

Record and track attendance accurately and consistently. The knowledge that you keep detailed attendance records may be enough to deter some employees from abusing leave policies. Monitor attendance daily for accuracy. At the end of each year, place a copy of each employee's annual attendance record in his/her personnel file and begin a new form.

Keep attendance records for all employees in a single location, such as a binder, where they can be updated daily. Report attendance to whomever handles your payroll. If the employee is nonexempt, deductions must be made for time not worked.

Legal standards do not state how much absenteeism or tardiness you must endure before taking disciplinary action. Some legal constraints do apply to the incidents that you can count against an employee. Absences protected by law, including leave under mandatory paid sick leave laws, FMLA, the CFRA, PDL and "kin care" cannot be charged against an employee's attendance record. State law also protects other reasons for absences.

Failure to administer attendance standards in an equal manner may result in a discrimination or retaliation claim, even if you use an apparently objective system.

Review an employee's attendance records when you prepare his/her performance evaluation. Depending on your company's size and organization, your personnel department staff, bookkeeper, office manager, supervisors or any other designated employee can keep attendance records. Establish a system that makes sense for your company and stick to it.

Caution: No-fault attendance policies, where discipline is automatic after a certain number of absences or a certain number of days of reporting to work late, may open an employer to liability under the ADA for failing to give the required leeway to reasonably accommodate an employee with disabilities or liability under other protected leave laws.

Attendance Record

Attendance Record Summary

Making Disciplinary Decisions

Some disciplinary actions arise from allegations of misconduct, such as theft, misuse of company property or disclosing confidential information. Before taking disciplinary action, conduct a thorough and reasonable investigation to verify that the allegation is true.

Promptly investigate all reasonable sources of information. Give the employee notice of the allegation and an opportunity to respond. If you act reasonably based on adequate information, courts will generally uphold your action even if they disagree with the result. Let the full extent of the investigation be determined by the seriousness of the incident and extent of the potential penalty. Disciplinary action is often based on the type of violation. Depending on the seriousness of the violation, employees may be given the opportunity to correct negative behavior.

Progressive Discipline

The progressive discipline process involves applying increasing disciplinary action each time a violation is repeated. Usually the disciplinary action starts with a verbal warning, ultimately progressing to termination if the employee fails to correct his/her unacceptable behavior.

The problem with progressive discipline policies is that they may erode the at-will employment relationship and may diminish the employer's right to discipline or terminate an employee immediately.

If you decide that you want to follow a progressive discipline process, you should reserve the right to apply whatever discipline is deemed appropriate in a given situation.

Some violations, such as theft or violence in the workplace, will require bypassing warnings and proceeding to discharging the employee immediately.

For more information, see "At-Will Employment" on page 887.

Consistency and Reasonableness in Disciplinary Decisions

Protect yourself against court action regarding employee discipline by being consistent and logical when applying your disciplinary policies. Thoroughly document the process and the disciplinary actions you take with individual employees. Consistency is important when applying disciplinary actions. Applying disciplinary actions inconsistently could expose you to charges of discrimination or unlawful termination.

A case from the Ninth Circuit Court of Appeals shows the pitfalls of inconsistent discipline. In *Earl v. Nielsen Media Research Inc.*, the court concluded that an employee could proceed with an age discrimination case after she showed that her employer applied a formal disciplinary process to younger employees, but did not apply this same disciplinary process consistently to older employees.[1]

To avoid legal trouble, establish a fair and reasonable disciplinary process. The process should give the employee the opportunity to:

- Know job expectations and the consequences of not fulfilling those expectations.
- Expect consistent and predictable management action when rules are violated.
- Expect fair discipline based on facts.
- Have the opportunity to present a defense, if necessary.
- Appeal disciplinary action if company policy allows it.
- Show improvement if time permits.

To ensure that your disciplinary decisions are reasonable, fair and predictable, consider three factors before taking action:

- Work rules or performance standards
- Circumstances
- Penalties

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[1] *Earl v. Nielsen Media Research Inc.*, No. 09-17477 (9th Cir. 2011)

Work Rules or Performance Standards

- Is your disciplinary action reasonable and based on the normal capabilities of others working under similar conditions?
- Is the employee working at the same expected level as other employees doing the same job?
- Did you clearly communicate the work rules or the expected performance level to the employee?

Circumstances

- Does sufficient evidence exist that the employee violated the work rule or did not meet the performance standard? Did you document this evidence?
- Did you adequately train the employee so that he/she can be expected to meet the required performance standard?
- Did you consult a manager or supervisor to ensure that no other circumstances might excuse the violation? For example, did the employee receive conflicting or incorrect instructions?

Penalties

- Is the penalty reasonable and appropriate for the particular violation?
- Did you give the same penalty to other employees in similar situations?
- Did you treat other employees the same under similar circumstances?

Documenting the Discipline Process

No matter how you choose to implement your disciplinary policies, maintain an objective, constructive and non-confrontational atmosphere when dealing with disciplinary issues.

You are not required to create a document when you engage in a corrective or counseling session with an employee. However, judges and juries expect employers to put employees on notice when their performance or behavior can lead to termination. The importance of documenting each corrective or counseling session cannot be overestimated. Supervisors should always make a record of verbal warnings and performance discussions, even if the discussions seem informal.

In addition, an established performance appraisal program is also important in limiting liability. Supervisors should document any noteworthy incidents about the employee's ability or inability to perform a job. They should pay attention to and note personality traits that demonstrate a quick temper, frequent frustrations or violent reactions. If behavioral patterns or propensities that are inconsistent with job requirements continually occur, immediate disciplinary action, up to and including discharge, may be necessary.

Fully investigate and document any alleged incidents of serious misconduct. Interview potential witnesses and the accused employee and document these interviews. Advise employees that investigations should remain confidential.

Issuing Warnings

It is a common misconception that employees are entitled to three warnings before termination. No existing law stipulates a specific number of warnings. California Labor Code section 2922 presumes that employment is at-will and can be terminated with no warning at all unless the parties have agreed otherwise. An agreement about the number of warnings issued can come from oral assurances, written contracts, employee handbooks, or can even be implied based on your practice of giving a certain number of warnings to other employees.

Avoid any explicit or implied agreement requiring you to provide a certain number of warnings in all situations. Retain discretion to make disciplinary decisions based on the severity of the violation.

Holding Investigatory Meetings

In *NLRB v. J. Weingarten Inc.*, the U.S. Supreme Court established that union-represented employees have a right to request a union representative to be present during "investigatory interviews."[2] Investigatory interviews include meetings in which supervisors question employees to obtain information that could be used as a basis for discipline, or in which they ask employees to defend their conduct. If employees reasonably believe that discipline or other adverse consequences may result from what they say, they have "Weingarten rights" to demand union representation. For more information, see "Employer Investigations" in Chapter 31, page 951.

Non-union employees have the right to request the presence of a co-worker at an investigatory interview and cannot be disciplined for making this request. However, you are not obligated to grant the request in the non-unionized setting.[3]

Taking Disciplinary Action

Always conduct disciplinary actions in private and without interruptions. Allow enough time to present the issue completely. Give the employee a sufficient opportunity to comment or ask questions.

Never engage in a disciplinary action in a public setting. Disciplinary actions should include a private, face-to-face meeting with the employee.

When discussing disciplinary actions with employees, keep the following tips in mind:

- Never lose your temper in the course of a disciplinary meeting. When you lose control of your temper, you may say things that damage your relationship with the employee and that you may later regret.
- Tackle disciplinary action directly. Do not avoid it. Avoiding disciplinary action may actually harm an employee who is deprived of the chance to learn how to correct his/her behavior.
- Never play therapist. The employee may misinterpret the supervisor's personal questions as being nosy, overly analytical or an invasion of privacy, none of which is likely to achieve the desired change in behavior.
- Make sure that the employee assumes responsibility for change. By accepting excuses, supervisors deprive employees of the chance to accept responsibility for their mistakes and instead allow them to continue rationalizing their performance deficiencies.
- Get the employee's signature. Ask an employee to sign any written warning or disciplinary action agreement that is placed in his/her personnel record. Because most employees do not like being reprimanded, you may want to emphasize that a signature is not an admission of wrongdoing, but instead an acknowledgment that the employee received a warning.

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[2] *NLRB v. J. Weingarten Inc.*, 420 US 251 (1975)

[3] *IBM Corp.*, 341 NLRB No. 148 (June 15, 2004)

If an employee refuses to sign a written warning or disciplinary action agreement, note the refusal on the warning or agreement. If possible, ask a supervisor to witness the employee's refusal to sign. Then, ask the supervisor to sign a document stating that the employee refused to sign. You cannot force an employee to sign a written warning or disciplinary action agreement. Employees are entitled to receive a copy of any document that bears their signature.

Demoting Employees

State or federal laws do not specifically limit your right to demote an employee. However, your policies, if not carefully drafted, may limit that right. The California Supreme Court created a right to sue for "wrongful demotion" in breach of a contract to demote only for good cause. In *Scott, et al. v. Pacific Gas & Electric Co.*, two senior managers were disciplined for alleged misconduct by demotions and reductions in their salaries and benefits. The court agreed with the managers' argument that the employer's policies, practices and communications created an implied contract not to demote without good cause. Because the employer's handbook contained a progressive discipline system requiring counseling, oral and written warnings and other disciplinary steps before demotion would occur, the court found a breach of the implied contract not to demote without good cause.[4]

In general, you can demote an employee for a business reason or as a disciplinary measure, if the demotion does not breach a contract not to demote for any reason. You cannot demote an employee for a discriminatory reason or in retaliation for exercising a legal right. Examples include demoting an employee as a punishment for filing a workers' compensation claim or demoting only older employees because they have climbed higher in the company's salary structure and are deemed too expensive.

At-Will Employment

In California, the relationship of employer and employee is generally "at will." This means that, without an employment contract, the employer or the employee can terminate the employment relationship at any time, with or without cause. Over the years, California courts and the Legislature created exceptions to California's at-will presumption, increasing lawsuits for "wrongful termination." Therefore, carefully consider each termination decision.

Preserving Employment At-Will

California's Labor Code contains the following provision on at-will employment: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month."[5]

Unless a contract specifies otherwise, employment is presumed to be at-will. A terminated employee can overcome the presumption that the employment was at-will by proving:

- There was an employment contract for a specific length of time. For more information, see "Employment Contracts Modify At-Will Employment" on page 889.
- An exception to the at-will rule, created by statute, the courts or public policy, applies.

This section discusses the limitations on the freedom to terminate at-will employees.

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[4] *Scott, et al. v. Pacific Gas & Electric Co.*, 11 Cal. 4th 454 (1995)

[5] Lab. Code sec. 2922

Your employee handbook should include a carefully drafted statement of your at-will employment policy. Repeat this statement wherever there is any possibility that other subject matter can be read as creating a more permanent employment relationship. Examples of related policies include:

- Hiring
- Introductory period
- Introductory statement
- Discipline and termination
- Benefits
- Training

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Language in employee handbooks and policy statements has been an issue in numerous cases about the nature of the employment relationship and if cause is required for employee termination. Case law indicates that you can create detrimental ambiguities in the employment at-will relationship by promising fairness or equity in termination decisions, or by setting forth discipline or termination policies or procedures that conflict with at-will employment. Explicit promises in a handbook can create contractual liabilities for you if you fail to follow your policies.

Conversely, appropriate language in a handbook can help protect and preserve the employment at-will relationship. Without an employee handbook, you create significant vulnerability to a variety of wrongful termination lawsuits.

The nature of the employment relationship is not based on the handbook language alone. Statements of at-will employment must be consistent in the employee handbook, employment applications, employment contracts and other materials. Collect and review all related materials while preparing the handbook to ensure consistency in preserving the at-will relationship.

Promise to Terminate for Just Cause

You can negate the at-will employment relationship and create a promise to terminate only for "just cause" through a written or oral contract. "Cause" means a fair and honest cause or reason that you act on in good faith.[6] For example, in *Stokes v. Dole Nut Company*, a California Court of Appeal ruled that an employee creating a competing business constitutes a lack of loyalty and creates conflicts of interest that are just cause for termination.[7]

Employees seek attorneys to represent them when they feel they have been treated unfairly. By treating all employees fairly, you have a better chance of avoiding wrongful termination litigation. "Fairness" means making reasonable work rules, applying them evenhandedly, giving employees warnings and a chance to improve, listening to their side of the story and investigating the circumstances before making a snap judgment to terminate.

"Good Cause" Not Implied

In *Guz v. Bechtel National, Inc.*, the California Supreme Court strengthened at-will employment against claims of implied contracts.[8]

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[6] *R.J. Cardinal v. Ritchie*, 218 Cal. App. 2d 124 (1963)

[7] *Stokes v. Dole Nut Company*, 41 Cal. App. 4th 285 (1995)

If an employer maintains an explicit policy of at-will employment, an employee generally cannot claim that an "implied" contract existed only to terminate for good cause. The court explained that the mere existence of an employment relationship does not create an expectation that the employment will continue or that it will end only with good cause. According to the court, "longevity, raises, and promotions are their own rewards for the employee's continuing valued service" but do not, in and of themselves, guarantee future employment. If an employer maintains an explicit at-will policy, an implied contract of employment will be found only if the employer created, through words or conduct, a specific understanding that employment will be terminated only for good cause.

Based on this case, it is important to maintain an employee handbook with a strong statement that employment is at-will, and can be terminated at any time with or without cause and with or without notice. The rest of the handbook should not contain policies that would contradict employment at-will status, such as a progressive discipline policy that promises a certain number of warnings prior to termination, or a policy that requires employees to give two weeks' notice prior to leaving.

If an employer maintains a specific, explicit policy of at-will employment, an employee generally cannot claim there was an implied contract only to terminate for cause.[9]

Employment Contracts Modify At-Will Employment

A written or oral employment contract can override the at-will employment presumption and create a contract to terminate only for cause.

If an employment contract specifies that you will terminate only for cause, this creates an implied covenant requiring you to exercise "good faith and fair dealing" in the employment relationship.[10] Essentially, this means you should make decisions on a fair basis and treat employees who are similarly situated in the same manner. "Similarly situated" means employees who are in the same general job categories and who have similar seniority and rank. Two employees who are both secretaries but in different departments are probably similarly situated, unless one is a new hire and the other has worked for the company for many years.

Written Employment Contracts

An employee with a written employment contract has a right to have that contract honored. A written contract can contain explicit limitations on when and under what circumstances an employee can be terminated. An employee with a written contract cannot be terminated without just cause if you include a "just cause" provision in the contract.

You can limit your liability by using written employment contracts that enforce the at-will nature of employment. The written document should state that your right to terminate is unfettered and that the employment relationship is at-will. You are significantly more protected when a prospective employee voluntarily signs this agreement.

Prepare each written employment agreement individually to address the particular employment relationship involved. When preparing employment agreements, consider the following issues:

- Define the duration of the contractual employment relationship.
  - You can set forth a specified period of employment, and state that the period may be renewable at the option of the company.

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[8] *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317 (2000)

[9] *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317 (2000)

[10] *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317 (2000)

  - You can state clearly that employment is at-will and that the employment relationship can be terminated at any time, with or without cause. Even if employment is for a stated period, make it clear that you can terminate employment at any time.
- Include a merger and integration clause.
  - This clause states that the written document constitutes the entire agreement between the parties, that the parties cannot rely upon any representations or promises other than those specified in the agreement and that the document can be modified only in writing and when signed by a corporate officer.
- Include an arbitration agreement, if recommended by your legal counsel.
- Include a liquidated damages clause.
  - This clause specifically limits available remedies for breach of contract. Consult with legal counsel before including this option in an employment contract.

There are two major disadvantages of written contracts: first, written employment contracts tend to be less flexible; second, inadvertent omissions or ambiguities can be misconstrued. You must balance these considerations against the courts' willingness to imply contractual limits on terminations when a written at-will agreement does not exist.

Oral Employment Contracts

An oral contract that is based on the conversations between you and your employee is just as binding as a written contract. However, if litigation arises from an employment dispute, oral contracts create problems in proving what the parties agreed to. Oral contracts are often created in job interviews, when an applicant asks about job security. A response from the interviewer, such as, "As long as you do a good job, you will have a job," may create an oral contract. This oral contract prevents you from laying off that employee during an economically necessary layoff if he/she is doing a good job.

Oral Employment Contracts and Signed At-Will Agreements

In *Starzynski v. Capital Public Radio, Inc.*, a California Court of Appeal ruled that an employee with nearly 20 years on the job whose supervisor had promised him job security was nevertheless an at-will employee.[11]

Charles Starzynski worked as a program director for Capital Public Radio. After working there for over a decade, he signed an employment at-will agreement that stated only the company's board of directors could modify the agreement. Both before and after signing the at-will agreement, Starzynski's supervisor assured him that he would be terminated only for just cause. Starzynski resigned seven years later, claiming constructive discharge due to intolerable working conditions. (For more information, see "Understanding Constructive Discharge Claims" on page 898.) Starzynski filed a lawsuit for wrongful termination, alleging the existence of an implied contract to terminate him only for good cause despite the written at-will agreement.

The court ruled that the supervisor's oral promises of continued employment did not create an implied contract because Starzynski signed a clearly written acknowledgement that his employment was at-will. The court held that "an at-will provision in an express written agreement, signed by the employee, cannot be overcome by proof of an implied contrary understanding."

At-Will Agreements and the NLRB

In 2012, the National Labor Relations Board (NLRB) began challenging language in at-will employment agreements as violating employees' rights to engage in "concerted activities" —

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[11] *Starzynski v. Capital Public Radio, Inc.*, 88 Cal.App.4th 33 (2001)

generally, activities for the purpose of improving working conditions, union representation or collective bargaining. For more information, see "At-Will Employment Disclaimers" in Chapter 31, page 956.

There have not been any binding federal court decisions on this issue, and it is unclear whether the NLRB's position would survive judicial scrutiny. The NLRB has, however, indicated its willingness to expand its focus into reviewing common employee handbook policies (for more information, see Chapter 31, "Labor Relations in Private Employment"). Employers may want to consider disclaimers in their policies — that the at-will agreement is not intended to chill an employee's right to engage in protected concerted activity.

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Knowing When You Cannot Terminate an Employee

California's at-will employment presumption has been significantly diminished by legislation and by state and federal court decisions. Specific statutes limit your right to terminate an employee, and courts have expanded the concept of wrongful termination violating public policy. Although your policies and employee handbook may recite the at-will presumption and your employees may sign written acknowledgments of their understanding of that term, proper handling of terminations is your best defense against lawsuits.

Anti-Discrimination Statutes

Both state and federal statutes prohibit termination on the basis of certain characteristics, including:

- Age, for people 40 and older
- Gender identity and gender expression
- Marital status
- Medical condition, including genetic characteristics and genetic information
- National origin and ancestry (including driver's licenses for undocumented workers)
- Physical or mental disability
- Pregnancy, childbirth, breastfeeding and related medical conditions
- Race and color
- Religion
- Sex, including sexual harassment
- Sexual orientation
- Union activity
- Military and veteran status

Remember that everyone is protected in some way under anti-discrimination statutes. Everyone is of one sex or the other, is of some race and is either married or unmarried. It is a common misconception that only women can bring sex discrimination claims. A man could bring a claim if he believes he was denied a promotion or terminated on the basis of his sex.

For more information on anti-discrimination laws, see Chapter 26, "Employment Discrimination."

Anti-Retaliation Statutes

You cannot terminate an employee because he/she exercised a right granted by a state or federal statute or certain administrative regulations. Typically, employee anti-retaliation claims occur when an employee refuses to violate the law, for example, disposing of hazardous waste improperly or accepting less than the minimum wage or mandatory overtime rate, or when an employee "blows the whistle" to a government agency on an employer believed to be violating the law. Whistleblower claims are continually on the rise. For more information, see "Whistleblower Protections" in Chapter 26, page 707.

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Anti-retaliation laws include:

- Affordable Care Act (ACA)[12]
- American Recovery and Reinvestment Act of 2009[13]
- Bankruptcy Reform Act of 1978[14]
- California Occupational Safety and Health Act of 1973 (Cal/OSHA)[15]
- Clean Air Act of 1977[16]
- Consumer Credit Protection Act of 1968[17]
- Consumer Product Safety Improvement Act of 2008[18]
- Employee Polygraph Protection Act of 1988[19]
- Employee Retirement Income Security Act of 1974 (ERISA)[20]
- Energy Reorganization Act of 1974[21]
- Fair Employment and Housing Act (FEHA)[22]
- Fair Labor Standards Act of 1938 (FLSA)[23]
- Fair Pay Act[24]

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[12] 29 USC sec. 218c

[13] Section 1553 of Division A, Title XV, American Recovery and Reinvestment Act of 2009, P.L. 111-5

[14] 11 U.S.C. 525(b)

[15] Lab. Code secs. 6310-6312

[16] 42 U.S.C. 7622(a)

[17] 15 U.S.C. 1674

[18] 29 CFR 1983.102

[19] 29 U.S.C. 2001-2009

[20] 29 U.S.C. 1140

[21] 42 U.S.C. 5851

[22] Govt. Code sec. 12940(3)

[23] 29 U.S.C. 215(a)(3)

[24] Lab. Code sec. 1197.5

- Federal Corporate and Criminal Fraud Accountability Act (Sarbanes-Oxley Act) of 2002, protection for whistleblowers.[25]
- National Labor Relations Act (NLRA)[26]
- Occupational Safety and Health Act of 1970 (OSHA)[27]
- Protection of Juror's Employment Act[28]
- Railroad Safety Act[29]
- Surface Transportation Assistance Act[30]
- Title VII, Civil Rights Act of 1964 (Title VII)[31]
- Water Pollution Control Act[32]
- Protection for wage claimants[33]
- Protection for the industrially injured (workers' compensation)[34]
- Protection for Medi-Cal recipients[35]
- Protection against unfair immigration related practices[36]
- Protection for holding a driver's license granted under Vehicle Code section 12901.9 for undocumented workers[37]
- Right of employees to disclose information to a government or law enforcement agency[38]
- Right of state employees to "blow the whistle" on illegal activity[39]

For more information on retaliation, see "Retaliation" in Chapter 26, page 705.

Protected Activities

You cannot terminate an employee for participating in activities that are protected by law, including:

- A wage garnishment[40]
- Disclosing or refusing to disclose wages[41]
- Voluntarily participating in an alcohol or drug rehabilitation program[42]

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25. 18 U.S.C. 1514A
26. 29 U.S.C. 158(a)(4)
27. 29 U.S.C. 660(c)
28. 28 U.S.C. 1875
29. 45 U.S.C. 441
30. 29 CFR 1978.102
31. 42 U.S.C. 2000e-3(a)
32. 33 U.S.C. 1367
33. Lab. Code sec. 98.6
34. Lab. Code sec. 132(a)
35. Govt. Code sec. 13084
36. Lab. Code sec. 1019
37. Veh. Code sec. 12901.9
38. Lab. Code sec. 1102.5
39. Lab. Code sec. 1102.5; Govt. Code secs. 8547 et seq.
40. Lab. Code sec. 2929
41. Lab. Code secs. 232(a)-(b), 1197.5
42. Lab. Code sec. 1025

- Refusing to authorize the disclosure of medical information[43]
- Jury duty[44]
- Political activity[45]
- Military service[46]
- Acting as volunteer firefighter, reserve police officer or emergency rescue personnel[47]
- Refusing to patronize employer[48]
- Refusing to commit an illegal act[49]
- Taking time off to appear at a child's school about a suspension[50]
- Taking time off for a child's school or child care activities[51]
- Taking time off as a victim of domestic violence, sexual assault or stalking to obtain a restraining order, to receive care or counseling or to relocate[52]
- Maintaining privacy of arrest records that do not lead to convictions[53]
- Refusing to take a polygraph test[54]
- Enrolling in an adult literacy program[55]
- Refusing to participate in abortions[56]
- The results of a blood test for AIDS[57]
- Serving as an election officer on Election Day[58]
- Reporting apparent victims of abuse or neglect, as obligated by statute[59]
- Disclosing information on a violation of law to a government or law enforcement agency[60]

Rights Under the Labor and Unemployment Insurance (UI) Codes

You cannot discharge or discriminate against a person who:

- Sought information from the Employment Development Department (EDD) about his/her rights under the Unemployment Insurance (UI) Code or the Labor Code
- Cooperated with any EDD investigation

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[43] [illegible]

[44] [illegible]

[45] [illegible]

[illegible]

[46] [illegible]

[48] [illegible]

[49] Lab. Code sec. 2856

[50] Lab. Code sec. 230

[51] Lab. Code sec. [illegible]

[52] Lab. Code se[illegible]

[53] Lab. Code sec. 4[illegible]

[54] Lab. Code sec. 432.2

[55] Lab. Code s[illegible]

[56] Health and Safety Code sec. 123420(a)

[57] Health and Safety Code sec. 120980(f)

[58] Elections Cod[illegible]

[59] [illegible]

[60] [illegible]

- Testified or is about to testify in any proceeding that relates to the UI Code or the Labor Code

An employee who believes that his/her rights have been violated under the UI Code or the Labor Code can file a complaint with the Labor Commissioner. The employee may be entitled to reinstatement and reimbursement of lost wages and benefits.[61]

Avoiding Wrongful Termination Suits

No procedure guarantees freedom from exposure to wrongful discharge liability.

Even the best discipline procedure does not guarantee that you won't face wrongful termination lawsuits, nor does it guarantee that you are free from liability relating to wrongful termination.

In addition to claims for wrongful termination, employees often add other claims to a wrongful termination lawsuit. These claims can include:

- Defamation, libel and slander
- Intentional infliction of emotional distress
- Invasion of privacy
- Discrimination

Your best defense against such claims is an ongoing proactive approach that includes well articulated personnel policies and procedures that are consistent with California and federal labor laws. Apply these policies and procedures consistently and fairly.

Before terminating an employee, answer the questions on the *Termination Decision Checklist*. The checklist alerts you to the possible negative repercussions that could follow termination. If termination is in order, use the *Termination Checklist* to assist you in the process.

Termination Decision Checklist

Termination Checklist

As one employer discovered the hard way, firing a long-term employee with a history of positive performance reviews is an excellent way to get sued for age discrimination, wrongful termination and retaliation — especially if the decision to fire the employee is based on poorly documented performance issues.

Much of the employer's evidence suggested that the errors attributed to the employee were unacceptably grave because they implicated patient safety. Yet, the appellate court found no attempt by the employer to quantify either the number or potential seriousness of mistakes committed by other persons performing duties similar to the employee's, or to otherwise identify anything like a quantitative standard to which the employee's performance might be compared."[62]

The only performance benchmark put forth by the hospital was a performance evaluation form which indicated that errors of the type attributed to the employee would be acceptable at a rate of "less than one per day."

The hospital presented no evidence that the employee committed errors with anything approaching a daily or even weekly frequency. Using the employer's own performance benchmark, there was no support for the trial court's finding that "several mistakes on menus" over a period of four or five months supports a finding of unsatisfactory performance.

[illegible]

[illegible]

The appellate court concluded that since the employee had a long history of satisfactory performance, a jury could find that the list of supposed deficiencies had more to do with a new supervisor's attitude toward the employee than with the employee's actual performance.

Limiting Exposure to Lawsuits

Follow these suggestions to help limit your exposure to wrongful termination lawsuits:

- Review employee handbooks, work rules, job applications and other forms of employee communications to delete or limit statements about promises of fair treatment, progressive discipline and permanent employment.
- Consider using at-will language in employee handbooks and on employment applications. For example:

  "You are free to resign at any time, just as the organization is free to terminate your employment for any reason at any time. This provision can be modified only in writing, signed by an officer of the company."

  (To be signed by the employee:) I understand that my employment can be terminated at any time, with or without cause, and with or without notice, at the option of either the company or myself.
- If language concerning circumstances under which an employee may be terminated is retained in employee handbooks, make sure that such language includes layoffs and changes in operations.
- Include statements in employee handbooks and policies that you retain the ultimate discretion to make disciplinary and other employment decisions.
- Carefully train supervisors about personnel matters and their obligations under laws that cover the employment relationship. For more information see "Investigating Employees" on page 897.
- Insist on thorough and complete documentation of supervisory decisions involving all personnel matters. Review what job interviewers, including supervisors, say to prospective employees. Avoid statements such as, "A good future exists here if you work hard."
- Use standardized language in all interviews. Make sure that interviewers stick to the "script."
- When recruiting personnel, avoid references to "job tenure," "partnership track," "career path," "security," "permanent" and "the future."
- Establish a system to review performance evaluation forms so the evaluation correlates with the particular job the employee performs. Review completed evaluations to make sure that individuals are not overrated. Consider using narrative rather than checklist evaluations.
- Conduct employee reviews in a timely fashion. Conduct them accurately and consistently with company policy and practice.
- Consider not using an introductory period for a new employee. If you decide to use an introductory period, avoid the term "probationary period." Courts have determined that successfully passing a probationary period can indicate permanent status, conflicting with at-will employment status. If you use an introductory period, define its purpose. State that completing the period does not increase the employee's rights in his/her job.
  - For example: *An introductory period is a training period and a time to get acquainted. Completing an introductory period does not guarantee continued employment. After you complete that period, you still can resign and the company still has the right to terminate your employment at any time, with or without cause.*

- Standardize the method you use to terminate employees. Do not deviate from the established method. Make sure that the system includes a review of employee terminations by upper management.
- Carefully monitor all statements made by the employer representative in describing the reasons for and effect of the termination, such as in response to a UI claim or any other inquiry.
- Centralize in one person or department any responses to reference requests from former or current employees to avoid inaccurate statements about the employee.
- Conduct exit interviews.
- Attempt to obtain a release and/or separation agreement from terminated employees.
- Prohibit supervisors from providing letters of reference that contain inaccurate statements about the terminated employee.

Investigating Employees

You must conduct an investigation fairly. Follow procedures that create fairness. California law emphasizes that an employer's findings from an investigation do not need to be correct if the employer followed a fair procedure to come to that result.

In *King v. United Parcel Service, Inc.*, an employee who had recently returned from medical leave was terminated for a violation of organization policy, falsifying a timecard. The employee sued for wrongful termination. The employer investigated the employee's alleged violation and found that it had occurred.[63]

King sued UPS, claiming he was fired because he is disabled and that the reason UPS gave for termination was pretext and bad faith. He also claimed that UPS was wrong in its belief that he falsified the timecard. The court found that King failed to present any evidence establishing that UPS discriminated against him, and that it did not matter if he committed an integrity violation of UPS' policies if UPS honestly believed he did. UPS conducted a thorough and objective investigation and came to a reasonable conclusion. California law consistently emphasizes that an employer's findings from an investigation do not need to be correct if the employer followed a fair procedure to come to that result.

Using the Good-Faith Standard

The California Supreme Court ruled that when an employer terminates an employee based on a good-faith determination of employee misconduct, the termination itself does not create the foundation for a wrongful termination claim even if the employee later proves that the misconduct did not occur.

In *Cotran v. Rollins Hudig Hall International, Inc.*, an employee was terminated for sexual harassment after an extensive and well-documented investigation. At trial, the employee who was accused of harassment testified that the acts labeled sexual harassment were consensual sexual relationships, not unlawful harassment. The California Supreme Court granted a review of the case to determine the proper standard that juries should use when evaluating an employer's "good-faith" defense.

According to the California Supreme Court, a jury must determine if the employer's decision to terminate an employee was reached honestly, after an appropriate investigation and for reasons that were not arbitrary or designed to hide the real reason for the termination. If so, the employer did not wrongfully terminate the employee, even if the alleged misconduct never occurred.[64] For more information, see "Conducting Appropriate Sexual Harassment Investigations" in Chapter 27, page 811.

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[63] *King v. United Parcel Service, Inc.*, 15[illegible]

[64] *Cotran v. Rollins Hudig Hall International, Inc.*, 17 Cal[illegible]

Understanding Constructive Discharge Claims

An employee who resigns can bring a claim for wrongful termination known as "constructive discharge." Constructive discharge covers situations where, rather than terminating the employee, the employer makes working conditions so intolerable that the employee will resign. An employee can also bring a constructive discharge lawsuit against an employer that offers an employee the supposed choice of quitting or being fired.

To sustain a constructive discharge claim, an employee must show that the working conditions that caused him/her to resign were sufficiently extraordinary and egregious so that a reasonable person would be compelled to resign. In addition, the employee must notify the employer of these conditions prior to resigning.[65] In *King v. AC&R Advertising*, the Ninth Circuit Court of Appeals ruled that renegotiating a compensation agreement does not create sufficiently intolerable working conditions to sustain a constructive discharge claim.[66] Similarly, a demotion, even if accompanied by a reduction in pay, does not trigger a constructive discharge claim.[67]

Your most effective defense against constructive discharge claims may be an "open door" policy, that management treats seriously. Document and address employee concerns in an appropriate manner.

For more information, see "Constructive Discharge" in Chapter 27, page 799.

Avoiding Public Policy Violations

Wrongful discharge in violation of public policy means that an employee was terminated for an unlawful reason that violates explicit state or federal government public policy. A wrongful discharge in violation of public policy lawsuit can provide a successful plaintiff with a huge jury verdict.

Even at-will employees cannot be terminated for an unlawful reason that violates public policy. For more information, see "Knowing When You Cannot Terminate an Employee" on page 891.

Violations of public policy generally fall into four categories:

- Termination for refusing to violate a statute
- Termination for performing a statutory obligation
- Termination for exercising a statutory right or privilege
- Termination for reporting an alleged violation of a statute of public importance[68]

These claims often arise when an employee refuses a supervisor's sexual advances, reports the employer to health and safety officials or makes a wage claim to the state Labor Commissioner. Even if a lawsuit shows that the subsequent termination was unrelated to these actions, a claim for wrongful termination in violation of public policy may follow and prove extremely costly to defend.

Foley v. Interactive Data Corp. is the most important termination in violation of public policy case. In *Foley*, the California Supreme Court ruled that an employee must show that the violated public policy is fundamental and of benefit to the general public, rather than just to that employee or employer.[69]

Following *Foley*, the California Supreme Court added another requirement for plaintiffs attempting to prove wrongful termination in violation of public policy. In *Gantt v. Sentry Insurance*, the court ruled

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[illegible]

that a plaintiff must show that the public policy involved comes from the state or federal Constitution or a state or federal statute. In *Gantt*, an employee claimed that he was terminated for supporting and testifying in his co-worker's sexual harassment claim. Because the California Constitution and FEHA prohibit discrimination/harassment on the basis of race/color, religious creed, national ancestry/origin, physical disability, mental disability, genetic information, medical condition, marital status, sex, gender identity, age and sexual orientation provided a basis for his claim, he prevailed in the lawsuit against the employer.[70]

Termination for refusing to violate a governmental regulation can also be the basis for a claim, if the regulation states a fundamental public policy and is authorized by statute.

In *Green v. Ralee Engineering Co.*, the California Supreme Court held that administrative regulations can also serve as a source of fundamental public policy, limiting an employer's right to discharge an at-will employee. In *Green*, a quality control inspector for an aircraft parts manufacturer alleged that he was terminated for objecting when the employer shipped parts that failed to pass inspections. The court found that the administrative regulations that implement the Federal Aviation Act of 1958 constituted a source of public policy that could support a wrongful termination claim.[71]

Some examples of cases where terminated employees successfully proved wrongful termination in violation of public policy include:

- *Collier v. Superior Court*, termination for reporting to the employer that other employees engaged in bribery, kickbacks or tax evasion[72]
- *Semore v. Pool*, termination for refusing to submit to drug testing, which violates the right to privacy created by the California Constitution[73]
- *Petermann v. International Brotherhood of Teamsters*, an employee who refused to perjure himself at a hearing despite his employer's insistence that he do so to protect the organization[74]
- *Rojo v. Kliger*, an employee who was forced to resign after refusing to enter into a sexual relationship with her supervisor[75]
- *Garibaldi v. Lucky Food Stores, Inc.*, an employee who reported adulterated milk to health officials[76]

Misleading Potential Employees

The California Supreme Court ruled that an employer who uses misrepresentations to induce an employee to take a job may be liable for fraud if the company later terminates the employee. In *Lazar v. Rykoff-Sexton, Inc.*, the employee was intensely recruited to leave his long-term employment to accept a job in California. The company made promises of job security, significant and regular pay increases and bonuses. Based on these promises, the employee accepted the job and moved to California. Two years later, the employee was terminated, having failed to receive the promised bonuses or salary increases. The California Supreme Court ruled that making false assurances of a secure position and significant increases in pay amounted to fraud on the employer's part.[77]

The employee can sue for fraud, and the Ninth Circuit Court of Appeals ruled that the employee's spouse also can file his/her own fraud claim. In *Meade v. Cedarapids*, the court noted that "because spouses usually make decisions as a family unit rather than as separate individuals, it is likely that the process of deciding whether to relocate for a new job involves convincing the spouse that the positive qualities of the new job outweigh the difficulties caused to the family."[78]

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[70] *Gantt v. Sentry Ins*[illegible]

[71] *Green v. Ralee E*[illegible]

[72] *Collier v. Sup*[illegible]

[73] *Semore v. Pool*, 217 Cal. App. 3 [illegible]

[74] *Petermann v.* [illegible]

[75] *Rojo v. Kliger*, 52 [illegible]

[76] *Garibaldi v. Lucky Food Stores, Inc.*, 726 [illegible]

[77] *Lazar v. Rykoff-Sexton, Inc.*, 12 [illegible]

Holding Corporations Liable for Wrongful Termination

In California, a corporate employer cannot be liable for punitive damages for wrongful termination unless an officer, director or managing agent:

- Had advance knowledge of the unfitness of the employee who wrongfully terminated the claimant and employed him/her with a conscious disregard of the rights or safety of others
- Authorized or ratified the wrongful conduct for which the damages are awarded
- Was personally guilty of oppression, fraud or malice[79]

In *White v. Ultramar, Inc.*, the California Supreme Court ruled that the mere ability to hire and fire employees does not elevate a supervisory employee to a position of managing agent for the corporation. "Managing agent" includes only those corporate employees who exercise substantial independent authority and judgment in their corporate decision making. Further, their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under this definition is a question that must be decided on a case-by-case basis.[80]

Final Pay

Failing to provide a terminating employee with his/her final paycheck in a timely manner can subject you to waiting time penalties. The time requirement to pay the employee depends on a number of factors.

The time requirement for a final paycheck depends on if the employee quit without notice, quit with at least 72-hours notice or was terminated or laid off. Certain industries are granted exceptions to the final paycheck requirements.

The *Final Paycheck Worksheet* can assist you in this process. Be sure to ask terminating employees to sign a copy of the *Final Paycheck Acknowledgment.*

Final Paycheck Worksheet

Final Paycheck Acknowledgment

Final Paycheck Acknowledgment - Spanish

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[78] *Meade v. Cedarapids*, 164 F.3d 1218 (9th Cir. 1999)

[79] Civ. Code sec. 3294 (b)

[80] *White v. Ultramar. Inc.*, 21 Cal. 4th 563 (1999)

Final Pay After Termination and Layoff

If you terminate an employee or lay him/her off with no specific return date within the normal pay period, all wages and accrued vacation earned but unpaid are due and payable immediately.[81] It is not acceptable to ask or require an employee to wait until the next regular payday for his/her final wages. You cannot withhold a final paycheck. It is illegal to withhold a final paycheck to induce the former employee to:

- Return tools, uniforms, mobile devices, laptop computers, keys or any other items belonging to you.
- Pay back money that he/she owes to you.
- Turn in expense reimbursement forms.

If there is a layoff with a return to work date within the pay period and the employee is scheduled to return to work, you can pay the wages at the next regular payday.[82]

Payment Due at Time of Discharge

The California Labor Code requires that employees receive all earned and unpaid wages at the time of termination from employment. If they do not, you can be assessed waiting time penalties. In *Smith v. The Superior Court of Los Angeles County*, the California Supreme Court ruled that neither length of employment nor reason for termination changes this requirement. An employee's service to an employer is completed either by completion of the hired-for task or at termination by the employer. Both constitute a discharge as defined by law. The "discharge" does not require an involuntary termination from an ongoing employment relationship. An employee hired to perform one day of service must be paid at the end of that day.[83]

Suspension Prior to Discharge

Some employers routinely suspend employees before termination to have time to prepare a final paycheck or to receive one from a payroll service or the employer's out-of-state headquarters. You can be penalized for a willful failure to pay final wages on time, unless there is a good-faith dispute that any wages are due.[84] An employee who could show that his/her suspension was merely a way to extend the time for final payment of wages, rather than legitimate time for your investigation, would probably be awarded waiting time penalties due to the lack of any good-faith dispute.

Payment Location and Method

Terminated employees must be paid at the place of termination.[85] The place of termination is the employee's location, not yours. If you terminate an employee who is not at your place of business, such as an employee who works remotely, you must be prepared to deliver the final paycheck at the moment you say, "You are terminated." Otherwise, you must pay the employee up until the date that he/she will actually receive his/her final pay.

If an employee who previously authorized direct deposit is discharged or quits, direct deposit of wages is immediately terminated. You can pay final wages earned and unpaid at the time an employee is terminated by direct deposit to the employee's account *only* if the employee voluntarily authorized you to do so. You must observe the time limits for making final pay available to the terminating employee.[86]

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[81] Lab. Code sec. 201; *Campos v. Employment Development Department*, 132 Cal. App. 3d 9 [illegible]

[82] DLSE *Enforcement Policies an* [illegible]

[83] *Smith v. The Superior Court of Los Angeles County*, 39 Cal. 4th 77 (200 [illegible]

[84] 8 CCR sec. 13520

[85] Lab. Code sec. 208; DLSE *Enforcement Policies and Interpretations Manual* [illegible]

[86] Lab. Code sec. 213(d)

If an employee requests his final pay delivered by direct deposit to one or more bank accounts, use the *Final Paycheck Direct Deposit Authorization.*

Final Paycheck Direct Deposit Authorization

Final Paycheck Direct Deposit Authorization - Spanish

Final Pay and Voluntary Quit: 72-Hours' Notice or More

If an employee quits with 72-hours notice or more, you must pay all wages and accrued vacation earned but unpaid on the last day of work.[87]

Quitting employees who provide at least 72 hours' notice are entitled to be paid on their last day of work, at the office or agency of the employer in the county where the employee has been working.[88]

Final Pay and Voluntary Quit: Less Than-72 Hours' Notice

If an employee quits with less than 72-hours notice, you must pay all wages and accrued vacation earned but unpaid within 72 hours after notice is given. An employee who gives less than 72-hours notice is entitled to receive his/her final wage payment by mail if he/she so requests and designates a mailing address. For purposes of the 72-hour requirement, the mailing date is considered the payment date.[89]

Voluntary Quit Defined

New 2016

The California Supreme Court granted review of a case that held that a retirement also constitutes a "quit" under the Labor Code for purposes of final pay.[90] The case involved a deputy attorney general for the state of California who claimed she did not receive her final paycheck for wages and accrued, unused vacation within 72 hours of her retirement date. The state argued that the employee did not "quit," she retired and so the final pay rule did not apply. The court disagreed finding that the word "quit" really spoke to the person leaving a job and encompassed retirement. The court held that a retirement is considered a "quit" under these provisions of the Labor Code and triggers the timely payment of final wage requirements.

At the time of publication, this case was still pending before the California Supreme Court.

Mailing the Final Check

Unless the employee who quit specifically requests payment by mail, you may hold his/her final paycheck until it is picked up. Mailing the final paycheck without a request to do so could subject you to waiting time penalties. The employee could show up to pick up the check after it has been mailed but before it is delivered. Unless you are willing to write a duplicate check and stop payment on the original, the employee will be forced to wait for his/her wages beyond the legal deadline.

[illegible]

[illegible]

[illegible]

[illegible]

Expense Reimbursements and Final Pay

The payment deadlines for final wages do not apply to reimbursement of expenses that the employee may have incurred on your behalf. Those reimbursements can be made at the normal time for payment.[91]

Wrongful Termination Based on Improper Wage Payment

The case *Gould v. Maryland Sound Industries, Inc.*, held that prompt payment of wages is a fundamental public policy of California. Terminating an employee to avoid paying due wages subjects you to the claim of wrongful termination in violation of public policy.

Terminating an employee who recently alleged improper payment of wages can create a huge liability unless the reason for the termination is clearly unrelated to the wage allegations and is thoroughly documented.[92]

Severance Pay

Severance pay is not required by law. Be cautious when giving severance pay to a terminated employee because it can set a precedent for future terminations. After paying one employee severance pay, failure to do so for another employee could invite legal claims that the subsequent denial of severance pay was discriminatory.

The EDD does not usually consider severance pay as wages for purposes of determining eligibility for and benefit levels related to unemployment insurance.

Final Commission Payments

Commissions are considered wages, covered by the normal rules about timing of wage payments. However, commissions present special issues regarding the timing of final wages. Many commission plans delay payment of commissions until payment for a sale is received from a customer. Therefore, receipt of a customer's payment on a sale can occur after a commissioned employee quits or is terminated from employment. The Labor Commissioner recognizes that it is impossible to calculate commissions on customer payments not yet received and exempts these wages from the normal final wage payment deadlines.

You can continue to pay out commissions to a former employee after the employment relationship ends. The law is unclear as to whether you must send the former employee a check each time a customer pays for a sale that he/she had made, or whether you can continue to pay him/her on the normal pay schedule for all customer payments made within that period. You may want to consult with legal counsel about this issue.

For more information, see "Commissions" in Chapter 11, page 257.

Final Pay for Temporary Employees

Wages for employees of temporary services employers must be paid weekly. If an employee is assigned to a client on a day-to-day basis or to a client engaged in a trade dispute, the employee must be paid daily. Failure to do so can result in civil and criminal penalties.

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[91] DLSE *Enforcement Policies and Interpretations Manual* sec. 4.3.4

[92] *Gould v. Maryland Sound Industries, Inc.*, 31 Cal. App. 4th 1137 (1995)

Labor Code section 201.3 was amended to provide that:

- An employee's wages are due and payable no less frequently than weekly, regardless of when the assignment ends. Wages for work performed during any calendar week shall be due and payable not later than the regular payday of the following calendar week.
- If an employee of a temporary services employer is assigned to work for a client on a day-to-day basis, that employee's wages are due and payable at the end of each day.

Both requirements apply unless the employee is assigned for more than 90 days.

Final Pay for Employees In the Theatrical and Concert Industries

Unionized employees in the live theatrical and concert industries, who are dispatched routinely from hiring halls to jobs at theaters or concerts, can negotiate time limits for final payment of wages through collective bargaining. If the negotiated time limit is violated, waiting time penalties will apply.[93]

Assembling Final Pay Documentation

After you make the decision to discharge an employee or you receive a notice of voluntary termination, collect all timecards and documentation about the employee's unpaid work period. Notify the person who is responsible for issuing the final paycheck of the time constraints.

Use the *Final Paycheck Worksheet* to calculate and, if applicable, prorate, the amount of time actually worked through the final day of work. Include regular hours, overtime and paid holidays that fall in this period, plus any accrued paid vacation.

Final Paycheck Worksheet

Consider any other benefits that may be due to the employee, such as other employer provided paid leave (if your policy dictates that accrued leave is paid to the employee in this circumstance), severance pay, employee expenses on your behalf, etc. After determining the amount due to the employee, make the proper calculations for any deductions, such as:

- Federal, state and local income taxes
- Social Security
- Medicare
- State unemployment insurance
- State Disability Insurance (SDI)
- Life insurance
- Health insurance
- Long-term disability insurance
- Miscellaneous items, such as parking, etc.

You may not deduct from an employee's final check any amount representing the unpaid balance of a debt owed by the employee, even though the indebtedness is contained in a written agreement to pay the full amount of the debt on demand, at termination or otherwise. For more information, see "Employee Debts, Loans and Deductions" in Chapter 11, page 273.

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[93] Lab. Code sec. 201.9

In addition to the *Final Paycheck Worksheet*, use the *Final Paycheck Acknowledgment* or *Final Paycheck Acknowledgment - Spanish* form to document that the employee received his/her final paycheck.

Final Paycheck Worksheet

Final Paycheck Acknowledgment

Final Paycheck Acknowledgment - Spanish

Ask the employee to sign an acknowledgment that he/she received the final paycheck to document that you met the last paycheck deadline. You can also confirm with the employee that he/she received proper payment. Neither of the forms is required, but they are good business documentation.

Note: If you have non-negotiated checks on your books which are made payable to employees whose employment has been terminated (i.e., because you are unable to locate the employee) and you have made all reasonable efforts to pay the wages, you may send the non-negotiated checks with an explanation of your efforts to contact the employee to the nearest office of the Labor Commissioner. The Labor Commissioner will make further efforts to locate the employee to make payment of the wages and, if unsuccessful, the checks will be deposited into the State of California Unclaimed Wages Fund. Visit the DIR website, at http://www.dir.ca.gov/dlse/DistrictOffices.htm, to locate the nearest office of the Labor Commissioner.

Conducting Exit Interviews

An exit interview is not required by law. An exit interview is a chance for you to learn from a departing employee his/her employment experience with your company. Many employers choose not to conduct exit interviews. An exit interview by a hostile employee can create documentation that could be damaging in a lawsuit or claim for UI benefits.

On the other hand, an exit interview could provide information that an employee is leaving your company for a substantially better job. This information may be significant to you. UI benefits paid to an employee who leaves one job for a substantially better one and who later becomes eligible for UI are not chargeable to the previous employer's account. This situation might occur if the former employee lost the new job or the new employer reduced his/her hours.

An exit interview can provide your company with organizational insights that may improve retention and future management. An exit interview may also unearth concerns relating to potential unlawful practices, such as discrimination, and allow your organization the opportunity to investigate and, if necessary, remedy the situation.

The *Exit Interview* form contains a series of questions. The answers to these questions would indicate if an employee is leaving for a substantially better job. Conduct an exit interview on the final day of employment or allow the employee to take the form home and return it by mail.

Exit Interview

If the employee is to return the form by mail, provide the employee with a postage-paid return envelope marked "confidential" and addressed to the person in your company who is authorized to receive the completed form. You can fill in the employee's answers if the exit interview is conducted orally. However, you will be more likely to receive candid answers if the employee is allowed to fill out the exit interview form himself/herself. Keep the exit interview in the employee's personnel file.

Employee Notices

Any time the employment relationship is terminated, you must meet certain requirements. You should consider several termination-related issues. Use the *Termination Checklist* to identify the required and recommended forms to fill out during the termination process.

Termination Checklist

Providing the *For Your Benefit* Pamphlet (Form DE 2320)

The EDD created the *DE 2320 - For Your Benefit, California's Program for the Unemployed* to explain employees' rights to UI, SDI and paid family leave (PFL).

When discharging, laying off or placing an employee on a leave of absence, you must provide that employee with written notice of his/her UI benefit rights by providing the *DE 2320 - For Your Benefit, California's Program for the Unemployed* pamphlet. You must give this pamphlet no later than the effective date of the termination. The pamphlet does not require any preparation. For more information, see "Required Unemployment Insurance Notices and Pamphlets" in Chapter 16, page 412.

You can obtain the pamphlet from:

- CalChamber by calling (800) 331-8877 or visiting the CalChamber Store at store.calchamber.com.
- Your local EDD office by mailing or faxing a completed *Requisition for EDD Forms* or ordering printed copies directly from EDD's website.

For more information, see the EDD's *DE 44 - California Employer's Guide*, "Notices and Pamphlets for Employees" section at www.edd.ca.gov/pdf_pub_ctr/de44-13.pdf. To order the guide from the EDD, use the *Requisition for EDD Forms*.

Providing the Notice of Consolidated Omnibus Budget Reconciliation Act (COBRA) Rights

Any employer who has 20 or more employees and offers a group insurance plan must give notice of Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) rights. COBRA entitles "qualified beneficiaries" to continued benefits under the group insurance plan. For more information on your COBRA obligations, see "COBRA" in Chapter 17, page 445.

Termination Notice and UI

When an employee is involuntarily terminated, you must give immediate written notice to the employee of a change in the employment relationship. This notice must be given to an employee who is discharged, laid off, given a leave of absence or whose status changes from employee to independent contractor.[94] The law does not require a written notice for employee-initiated terminations or cessation of work due to a labor dispute, although you may choose to provide the notice.

There is not a specific form for the required notice. You can create your own form, send the appropriate information in a letter, or use the sample *Notice to Employee as to Change in Relationship*.

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[94] UI Code sec. 1089; 22 CCR sec. 1089-1

If you create your own form or letter, you must include the following information:

- Your company name
- The name of the person to contact at your company if EDD needs further information
- The employee's name
- The employee's Social Security number (SSN)
- Indication that the action was a termination, layoff, leave of absence or a change in status
- The action date

Once completed, you give a copy of the form to the employee and retain a copy for your records. You can request that the employee sign an acknowledgment of receipt of the termination notice, but you are not required to do so by law.

The employee must be given a copy of the notice no later than the effective date of the termination.

Employers often hesitate to terminate an employee because they do not want to pay UI benefits. You must understand when an employee is eligible for UI benefits. You can prepare the documentation necessary to fight a claim that should be denied. For more information on UI, see Chapter 16, "Unemployment Insurance."

Use the sample *Notice to Employee as to Change in Relationship* to meet the EDD's requirements and to protest UI claims by an ineligible employee.

Notice to Employee as to Change in Relationship

Employers who document a specific reason for termination, such as poor attendance or performance, can use this form to help defend against employee allegations of wrongful or discriminatory termination. The sample notice provides checkboxes for you to choose the reason for the employment status change. The specified reasons correspond with the factors that the EDD considers to determine an applicant's eligibility for UI benefits. This form is valuable documentation if you must contest a claim for UI benefits. The sample notice lists the following reasons for termination:

- Voluntary quit — The employee chose to leave his/her job voluntarily. This person would be ineligible for UI compensation unless he/she can establish compelling personal reasons or can attribute good cause to the employer. An employee can quit a job and be eligible for UI when good cause is a substantial motivating factor in causing the claimant to leave work. The motivating factor may or may not be work connected. It must be real, substantial and compelling. It must be something that would cause a reasonable person to leave work under the same circumstances.
- Layoff — Available work ends either temporarily or permanently and through no fault of the employee. This claimant would most likely be eligible for UI benefits.
- Leave of absence — Usually occurs for reasons of health, pregnancy, discipline or a sabbatical that the employer offers. This claimant may be eligible to collect UI benefits.
- Termination — The employer has good cause to terminate an employee within the parameters of organization policy or union agreement. The employer must establish misconduct to avoid paying UI benefits.
- Refusal to accept available work — The employee refused to perform work that is:
  - Appropriate to the individual's health, safety, morals and physical condition
  - Consistent with the individual's prior experience and earnings

  - A reasonable distance from the individual's residence

  Under these circumstances, a claimant would most likely be ineligible to collect UI benefits.

- Change in status — The employee/employer relationship is being terminated, but you can choose to hire this person as an independent contractor. For more information on determining independent contractor status, see "Independent Contractors" in Chapter 6, page 96.

Give the completed termination notice to the employee. Although not required by law, request the employee's signature acknowledging that he/she received the termination notice. The EDD does not require you to submit a copy of the termination notice. Retain a copy in the employee's personnel file.

Provide a Statement of Reasons for Termination

Some employment law attorneys advise employers to state nothing on the termination notice or as little as possible about the reason for termination. This is to prevent you from writing something that could be used against you later if a terminated employee files a wrongful termination lawsuit or discrimination charge.

Other attorneys take the opposite approach. They advise employers to thoroughly document all disciplinary actions, including terminations. This statement serves as evidence in an UI appeal, but also, more importantly, would document that the employee was terminated for a legitimate reason instead of wrongfully terminated.

Consider the employer who discharges an employee because of poor job performance. The employer did not keep good records to document that performance and did not give a clear written warning about the unacceptable performance. The former employee then files a lawsuit alleging that he/she was terminated because of sex, race, pregnancy or some other discriminatory reason. If this employer specified the reason for termination on the termination notice, the employer could use the notice as evidence to counter the discrimination allegation.

If you have questions about documenting the reason for a termination, consult legal counsel.

You are not required to terminate an employee in person. You can terminate an employee by telephone, letter or any other means of communication. Remember that even if you do not inform an employee of his/her termination in person, the rules regarding final payment of wages apply. All final wages are due and payable immediately upon termination.[95] You are not required by law to mail or otherwise deliver the final wages, except under the circumstances discussed in"Final Pay and Voluntary Quit: Less Than 72-Hours Notice" on page 902. For information on final pay requirements, see "Final Pay" on page 900.

Providing References for Former Employees

It is important to develop and follow a sound policy for providing references for former employees. The key is to avoid liability for failing to provide enough information, perhaps about a former employee's violent tendencies, without invading the former employee's privacy, defaming the employee or creating evidence of discriminatory motives for the termination. See "Responding to Reference Checks" in Chapter 8, page 183, for more detailed information about developing a policy for providing employee references, as well as a sample *Authorization to Release Personnel Records.*

Authorization to Release Personnel Records

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[95] Lab. Code sec. 201

Discipline and Termination Policies

Make clear to all employees that you expect certain work performance standards, that certain personal conduct is required in the workplace and that you will not tolerate other conduct. These are conditions of employment. Examples include requiring employees to arrive at work on time, prohibiting drinking or being drunk in the workplace, etc. The policy should indicate that violating rules or expectations will trigger discipline or immediate termination of the employee.

You must document all events about the termination process. Consult an experienced employment law attorney before terminating an employee, particularly if extenuating circumstances exist or if the employee is a member of a protected class.

Job Abandonment

Neither California nor federal law regulates the amount of time you must hold a job for an employee who neither appears for work nor calls in to explain his/her absence. Your actions in this area are controlled only by your policy. Clearly set forth the consequences of no call, no show behavior. Indicate that the employee will be considered to have quit his/her employment if no call, no show occurs for the designated number of scheduled work days. Indicate that exceptions may be made for emergencies. Require employees to read and acknowledge the job abandonment policy.

Policies relating to discipline and termination are available as part of CalChamber's ***Employee Handbook Creator***. Visit store.calchamber.com to find out more about how to easily create your employee handbook.

Chapter 30

Layoffs and Plant Closings

With the exception of certain California laws restricting laying off some janitorial and building service personnel and other displaced workers, no law dictates how you select workers for layoff.[1]

However, the process that you use to select whom you will lay off is subject to review as a result of federal and state laws that protect employees from unlawful discrimination and retaliation. An employee who believes that he/she was selected for layoff because of membership in a protected class or participation in a protected activity can file a claim against the company under state and/or federal anti-discrimination statutes.

Making and Documenting Layoff Decisions

You must be prepared to justify the process that you used to select employees for layoff. You must prove that the layoff was carried out in an objective manner.

> **Example:** If your organization must reduce its staff of warehouse employees and the layoff disproportionately affects men over the age of 55, women or Asian Americans, the company must prove that the selection process was neutral for those groups.

To help you make legally supportable decisions when selecting employees for layoff, use the employee discipline documentation tools discussed in Chapter 29, "Disciplining and Terminating At-Will Employees." Using these tools, you can develop a set of objective criteria to select the employees to lay off. Make sure that you can clearly articulate the criteria you used and the reasons you selected the criteria.

Even a single individual can allege that he/she was laid off for a discriminatory reason or in retaliation for some protected activity, such as:

- Union advocacy
- Making safety complaints
- Whistleblowing to a government agency
- Complaining about unfair wages
- Protesting unlawful discrimination
- Filing a workers' compensation claim
- Testifying in a sexual harassment investigation

For more information on discrimination and termination, see "Knowing When You Cannot Terminate an Employee" in Chapter 29, page 891.

Rather than assuming that a layoff is necessary, first consider alternatives, such as reduced hours, job sharing, improved internal processes or salary and benefits cost reductions.

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[1] [illegible]

Creative approaches can save a lot of expense by:

- Retaining a productive workforce
- Avoiding recruiting costs when business picks up
- Showing concern for staff members
- Allowing employees to participate in matters that affect their lives
- Reducing unemployment insurance (UI) costs

Alternative to Layoff: Work Sharing Program

The California Employment Development Department (EDD) created a special work sharing program to help you avoid mass layoffs by sharing the available work among employees. The work sharing program allows for the payment of benefits to employees whose hours and wages have been reduced. This program was established by the California Legislature to help employers avoid some of the burdens that accompany a layoff situation, and is considered an alternative to layoffs.

The work sharing program offers you three basic advantages, because you can:

- Continue providing some work to all employees, rather than laying off significant groups
- Maintain a relationship with a trained workforce until the time business returns to normal
- Reduce overall cost. The employees involved in the work sharing plan receive lower amounts in unemployment benefits, although your costs are the same as any employer with a similar unemployment tax rating.

To participate in work share, at least 10 percent of the employer's regular workforce (or a unit of the workforce) and a minimum of two employees, must be affected by a reduction in hours and wages. The employees' reduction in hours and wages must be at least 10 percent, and must not exceed 60 percent. Other requirements must also be met.

Employers can apply to participate by completing a Work Sharing UI Plan Application from the EDD's website at http://www.edd.ca.gov/pdf_pub_ctr/de8686.pdf. The EDD's director must approve plans.

Work sharing requirements changed for plans effective on or after July 6, 2014. Plans effective before this date will continue under earlier requirements.

For more information about the work sharing program, visit EDD's work sharing webpage at http://www.edd.ca.gov/Unemployment/Work_Sharing_Program.htm.

For more information on work sharing, see "Work Sharing Program" in Chapter 16, page 421.

Selecting Employees to Lay Off

Typically, companies select employees with the least seniority to lay off first. However, there are important legal considerations to take into account when deciding which employees lose their jobs:

- Define a legitimate business reason for the layoff.
- Define objective criteria to determine which positions in your company are most appropriate for layoff.
- Clearly document the criteria.

- Do not use a layoff as pretext for terminating someone in a protected class or because they are on a protected leave of absence.

Example: The marketing department's budget is cut significantly for the upcoming year. To continue advertising to generate revenue, you must eliminate two positions. The department hired three employees within the last six months and did not anticipate the budget cut. However, the most recently hired employee has years of experience with companies who have experienced economic downturns and has demonstrated her ability to "make lemonade out of lemons." The other two new employees have similar work experience to one another.

In this example, it may not be in the company's best interest to terminate the most recent hire because the company needs her skills. But the other two employees have not been with the company for very long and do not have skills that the company requires while trying to improve business. The decision to select the other two employees for layoff is then based on a combination of seniority and business needs. Company policy should specify that management will determine reasons for layoff objectively based on legitimate business needs at the time and that seniority can be one of a number of factors. Company policy should specify that management retains the ultimate discretion.

Example: Your sales department is not generating enough revenue to support the number of sales people currently working in the department. Your company determines that if three sales people are laid off, the remaining sales people may have to work harder but the sales numbers should improve. One of the sales team members is on Family and Medical Leave Act (FMLA) leave. It is unclear if he will return from the leave so the company decides that he should be first to go.

In this example, the company has not defined objective criteria to determine which employees to lay off. Instead, it has made the decision based on the belief that the employee will probably not return to work, forgetting that an employee on FMLA leave has job protection for the 12 weeks of FMLA leave. State and federal laws also require employers to provide reasonable accommodation to disabled employees, which may include a leave of absence. If the company lays off this employee, the company will be vulnerable to a retaliation or discrimination claim for terminating an employee using FMLA.

Contrast this example with a situation in which an entire department or division within a department is laid off and one of the employees is on FMLA leave. An employee on FMLA leave or on another leave of absence that requires job protection does not have any greater right to his/her job than other employees.

When determining which employees to lay off, do not make decisions based on factors that appear to violate anti-discrimination laws. To avoid discrimination claims in layoff or recall decisions, base layoff decisions upon objective factors. Ensure that the layoffs do not affect protected class employees more significantly than employees who are not protected. For more information on discrimination, see Chapter 26, "Employment Discrimination."

Document the legitimate business reasons for the layoff. Make all layoff decisions in relation to those reasons. Further, if your employees are covered by a collective bargaining agreement, the agreement's terms control the layoff process.

Rehiring Laid Off Employees

The law does not provide guidance about whether you must give a laid off employee special preference when business improves or new jobs become available. Your layoff policy should specify what your rehire policy is. Any such policy should state that ultimate discretion to rehire an employee rests with you and that there is no guaranteed rehire.

Example: Your business always tapers off during the summer, but increases during the fall and winter months. You need employees who can hit the ground running and require minimal training when your busy season begins. In this case, your organization may want to institute a policy that gives laid off employees priority for re-employment during the busy season.

Example: You rarely lay off employees and you are unsure when business will improve or if your company will restructure in the meantime. In this situation, you are unable to make a commitment to employees who are laid off. You may not need a policy that specifies that laid off employees receive priority when hiring picks up.

Displaced Workers

There are restrictions on layoffs that may apply when you have a change in ownership or change in contract with certain types of workers. California law restricts layoffs of certain janitorial and building service personnel. There are also some specific municipal laws governing layoffs of various types of workers when there has been a change in ownership.

Rights of Janitors and Building Maintenance Personnel

California law prohibits at-will termination of janitors and building maintenance personnel under certain circumstances.[2] The Displaced Janitor Opportunity Act (DJOA) affects contractors and subcontractors, known as "successors," who are awarded janitorial or building maintenance contracts within 30 days of the termination of another janitorial or building maintenance contractor or subcontractor's contract at the same facility.

The DJOA requires a successor with 25 or more employees to hire and retain the previous contractor's employees for 60 days, unless:

- An employee had less than four months of service at the site(s) covered by the successor's contract
- The successor has just cause to refuse to hire an employee. In this context, "just cause" is defined as "reasonable and substantiated cause not to hire a particular employee based on that employee's performance or conduct while working under the terminated contract"[3]

The DJOA does not require the successor to pay the same wages or offer the same benefits as the prior contractor or subcontractor.[4]

Within three working days of receiving notification of contract cancellation, the terminated contractor must provide to the successor the name, date of hire and job classification of each employee at the site(s) that the terminated contract covered. If the terminated contractor does not know who the successor will be, the terminated contractor must provide the information to the person or company who terminated the contract. [5]

As the successor, you must make a written offer of employment to each employee in his/her primary language or another language in which he/she is literate. The offer must state how much time the employee has to accept the contract, with a minimum of 10 days.[6]

Local governmental agencies can impose stricter standards than this state law.[7]

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[2] Lab. Code secs. 1060-1065

[3] Lab. Code sec. 1061(b)(1)

[4] Lab. Code sec. 1061[illegible]

[5] Lab. Code sec. 1061[illegible]

[6] Lab. Code sec. 1061(b)(2)

[7] Lab. Code sec. 1064

Successor's First 60 Days

During the first 60-day period of employment, you cannot terminate any employee who was retained based on the DJOA, unless there is "cause" to terminate. Cause must be based "only on the performance or conduct of the particular employee." If layoffs must occur within the 60-day period for economic reasons, you must lay off employees in order of seniority by job classification.

At the end of the 60-day period, you must provide a written performance evaluation to each employee who was retained under the DJOA. If the employee's performance during the 60-day period is satisfactory, you must offer the employee continued employment. Any employment after the 60-day transition employment period is at-will employment. You can terminate the employee without cause unless you and the employee agree otherwise.[8]

Preferential Hiring Lists for Janitors and Building Maintenance Personnel

During the 60-day period, you must maintain a preferential hiring list of eligible employees whom you did not retain and you must use this list to hire any additional employees until all of the terminated contractor's employees have been offered employment. After the 60-day period, you need not use the list.[9]

You must provide a list of your employees and the employees of subcontractors at the site(s) to the person or company to whom you are providing services. The list must indicate which of the employees the terminated contractor or subcontractor had employed at the site(s). You must also provide a list of any of the terminated contractor's employees who were not retained. The list must state why these employees were not retained.[10]

Liabilities and Penalties Under the DJOA

An employer who violates the DJOA may be liable for back wages, benefits, attorneys' fees and court costs. Building owners are not liable under the DJOA.

The DJOA covers a contract that was entered into more than 30 days after the termination of a previous service contract if the contract was deliberately delayed to avoid the law's requirements.

Rights of Grocery Workers

New California legislation, effective January 1, 2016, provides job protections to grocery store workers when a grocery store changes ownership.[11]

The law applies to supermarket or other grocery retail stores that are over 15,000 square feet and sell primarily household foodstuffs for offsite consumption — the primary purpose being food sales.[12] It does not apply to grocery establishments in an area designated as a "food desert." It also does not apply if the parties agree that a collective bargaining agreement supersedes the law's requirements.[13]

Within 15 days following a change in control (sale, assignment, transfer or other disposition), the prior grocery employer must provide the new grocery employer with a list that contains the name, address, date of hire, and employment occupation classification of each "eligible grocery worker." The 15 days runs from the date of execution of the transfer document.[14]

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[8] Lab. Code sec. 1061

[9] Lab. Code sec. 1061(d)

[10] Lab. Code sec. 1061(f)

[11] Lab. Code secs. 2500-2522

[12] Lab. Code sec. 2502 (d)

[13] Lab. Code secs. 2512, 2516

[14] Lab. Code sec. 2504

An eligible grocery worker means any worker who is primarily employed at the grocery store and has worked there for at least six months prior to the change. Managers, supervisors or other confidential employees are excluded.[15]

The new law requires the new (successor) grocery employer to:[16]

- Maintain a preferential hiring list of eligible grocery workers from the list provided by the prior owner.
- Hire from that preferential hiring list for the first 90 days after the grocery establishment is fully operational and open to the public.
    - Verification of any offer must be retained for three years after the date of the offer. The verification must include the name, address, date of hire, and employment occupation classification.
- Retain eligible workers for at least a 90-day transition period and not discharge them without cause.
    - An exception to the retention requirement exists if after opening, the new owner determines that it requires fewer workers. If so, the new owner must retain by seniority or pursuant to a collective bargaining agreement.
- Provide a written performance evaluation for each worker at the end of the 90-day transition period.
    - Written performance evaluations must be retained for at least three years.
- Consider offering continued employment to the worker if the worker's performance during the 90-day transition period was satisfactory.

During the 90-day transition period, the retained workers will be employed under terms and conditions set by the successor employer and/or pursuant to any relevant collective bargaining agreement.

The prior grocery store must also post a public notice of the change in control at the location of the affected store within five business days following execution of the transfer document. Specific information is required.[17]

Local government agencies can impose stricter standards than this state law.[18]

Municipalities Can Ban New Ownership Layoffs

Cities can enact local ordinances dealing with displaced workers.

The California Supreme Court upheld a Los Angeles ordinance that forbids new owners of large grocery stores from laying off the existing workforce for 90 days after the new ownership takes over.[19]

The ordinance requires large grocery stores that go through a change in ownership to recognize a period of 90 days as an employee job vesting period during the ownership transition period. Large grocery stores are defined as stores that are 15,000 square feet or larger.

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[15] [illegible]

[16] [illegible]

[17] [illegible]

[18] [illegible]

[19] [illegible]

The ordinance requires:

- The prior owner to prepare a list of nonmanagerial employees with at least six months employment.
- The new owner to hire from that list during the 90-day transition period.
- The new owner to only discharge the hired employees "for cause" during the transition period.
- The new owner to prepare a written evaluation of each employee's performance at the end of the transition period.
- The new owner to consider offering continued employment if the employee's performance is satisfactory.

The ordinance states that if the workforce is unionized, the union and the employer can agree on alternative hiring arrangements.

Other municipalities have similar ordinances. These include:

- Gardena (grocery workers)
- Santa Monica (grocery workers)
- San Francisco (grocery workers)
- San Jose (airport business workers)
- Oakland (hospitality)
- Emeryville (hotel workers)
- Berkeley (marina workers)

Mass Layoffs and Plant Closings

Federal law requires advance notice of mass layoffs under the Worker Adjustment and Retraining Notification Act (WARN). California has its own version of the WARN Act. The two types of laws contain some distinct differences.

Under the federal WARN Act, companies that employ a certain number of employees must provide affected employees, their representatives and specified government officials and agencies with 60 days' advance, written notice prior to any mass layoffs or plant closings.

California's version of the WARN Act is broader in scope than the federal act and affects more employers. California businesses must comply with the requirements of both laws.[20] Penalties, including up to 60 days' back pay per employee, could be assessed for failing to provide required notice.

This chapter explains both sets of laws and what you must do to comply with them.

Covered Employers

In general, employers are covered by the federal WARN Act if they have 100 or more employees, not counting part-time employees who have worked less than six months in the last 12 months and not counting employees who work an average of less than 20 hours a week.[21] The federal WARN Act also applies to employers who employ 100 or more employees who together work at least 4,000 hours per week.[22]

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[20] [illegible]

[21] [illegible]

Under California law, employers who directly or indirectly own a covered establishment must give notice to affected employees of the covered establishment. A covered establishment is any industrial or commercial facility or part thereof that employs or has employed 75 persons within the preceding 12 months.[23] There is no requirement that the worker be employed full time; both full- and part-time employees will be counted toward California's 75 person requirement.

State law does not apply to employees who were hired with the understanding that their employment is seasonal and temporary. State law also does not apply to employees who were hired with the understanding that their employment was limited to the duration of a particular project or undertaking by an employer who is covered by Wage Order 11, Broadcasting Industry; Wage Order 12, Motion Picture Industry; or Wage Order 16, Certain On-Site Occupations in the Construction, Drilling, Logging and Mining Industries.[24]

If a parent organization orders a workforce reduction, the parent organization is responsible for its subsidiaries' notice obligations, even if the parent does not directly operate the affected facility.

An organization that provides outsourced personnel management, payroll and human resources administrative services cannot be held liable for its client's failure to provide legally required mass layoff notices. In *Administaff Companies v. New York Joint Board*, the outsourcing company did not participate in the decision to close the plant, nor was it aware of the plan until after the plant closed. Although it was a co-employer to the extent it provided group benefits and workers' compensation insurance, it did not share ownership, directors or officers; maintain common personnel policies with the failing company; nor did it exercise control over employees or operations.[25]

Events That Trigger the WARN Act

All of the following events trigger the notice requirement under federal or state law.

- Plant closing (federal law)
- Mass layoff (federal and state law)
- Termination (state law)
- Relocation (state law)

Because California law requires you to give your employees notice of any mass layoff, relocation or termination, if you are considering reduced activity at your workplace, carefully measure your proposed action against these definitions.

Features of Mass Layoff and Plant Closing Laws

Plant Closing

Under federal law, a temporary or permanent "plant closing" is the shutdown of a single site of employment or of one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss for 50 or more employees during any 30-day period.

To determine if there is an employment loss for 50 or more employees, you do not count part-time employees — those who have worked less than six of the last 12 months, or employees who work an average of less than 20 hours a week for that employer.[26] These groups, while not counted toward the 50 employees for defining plant closing, are entitled to notice. See "WARN Act Notice to Employees" on page 921.

An employment action that effectively ceases production and stops the work that a unit performs, even if a few employees remain, is a shutdown.[27]

Under federal law, "employment loss" is:[28]

- An employment termination, other than a termination for cause, voluntary departure or retirement.
- A layoff exceeding six months.
- A reduction in an employee's work hours of more than 50 percent in each month of any six-month period.

Mass Layoff

Under federal law, a "mass layoff" is a reduction in force that is *not* the result of a plant closing and that results in an employment loss at a single site of employment during any 30-day period for:

- At least 33 percent of full-time employees and at least 50 or more full-time employees; or
- At least 500 full-time employees.[29]

Under state law, a "mass layoff is a layoff during any 30-day period of 50 or more full- or part-time employees who have been employed for at least 6 of the 12 months preceding the date on which notice is required. Under state law, a layoff is separation from a position for lack of funds or lack of work.[30]

The California law defines "mass layoff" more broadly than the federal law. State law does not specify full-time employees. The state definition of "employee" includes part-time employees. Consequently, a layoff of any 50 or more employees, full-time or part-time, can trigger the state notice requirements. However, to be counted toward the 50 or more employees, the full- or part-time employee must have been employed for at least 6 of the 12 months preceding the date on which notice is required.

The number of employees who are actually employed at the time of a layoff and the number of employees affected trigger the federal WARN Act. An employer on the verge of finalizing the sale of its company cannot avoid obligations under the WARN Act, even if the employer recommends that its employees apply for jobs with the purchasing company. According to the Seventh Circuit Court of Appeals, "the WARN Act does not require employees to take business risks; employees' entitlements depend on events as they are, rather than as employers hope they will turn out."[31]

In *Phason v. Meridian Rail Corp.*, Meridian Rail Corp. made a deal to sell its assets to NAE Nortrak, Inc. Meridian told its employees of the impending sale, then recommended that they apply for jobs with NAE. Eight days after Meridian laid off more than 50 employees, the sale was finalized and NAE hired all but 40 to 45 of the Meridian employees who had been laid off.

The WARN Act requires employers with 100 or more employees to give 60 days' notice before a layoff of 50 or more employees. Meridian claimed that it did not have to comply with the WARN Act because the

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[illegible]

[illegible]

28. 29 U.S.C. 2101 (a)(6)

29. 29 U.S.C. 2101(a)(3)

30. Lab. Code sec. 1400 (c)(d)

31. *Phason v. Meridian Rail Corp.*, 479 F.3d 527 (7th [illegible]

layoff affected only 40 to 45 employees who were not eventually hired by NAE. The court disagreed. The law refers to the actual number of employees who were laid off — in this case more than 50 — not the number of employees who get a job soon thereafter.

Termination

Under state law, a "termination" is "the cessation or substantial cessation of industrial or commercial operations."[32] The law does not indicate what qualifies as a substantial cessation of operations. The courts must decide what constitutes a substantial cessation, unless subsequent regulations clarify the issue.

Under state law, you must give notice if you have a termination.

Relocation

Under state law, a "relocation" is the removal of all or substantially all industrial or commercial operations to a location that is 100 miles or more away.[33] In California, you must give notice if you relocate.[34]

Under federal law, a "relocation" is the transfer of all or part of an employer's business to a different site and that transfer results in a plant closing or mass layoff.[35]

Under federal law, an employer need not give notice of a relocation if it offers to transfer the employees to a new site within a reasonable commuting distance and there is no more than a six-month break in employment, or if the employer offers a transfer to employees to a new site anywhere and they accept that offer.[36]

WARN Act Notice Content and Recipients

The content of the 60-day notice you must give and the manner in which you must serve the notice are substantially the same under both federal and state law.

You must give notice to the following individuals and groups:[37]

- Affected full-time and part-time employees
- Representatives of affected unionized employees
  - Under federal law, you must notify the representatives of affected unionized employees and unrepresented individual workers. However, under state law, you must notify all affected employees individually.
- The EDD
- Local workforce investment boards
- Chief elected city officials within whose boundaries the closing or layoff is to occur
- Chief elected county officials within whose boundaries the closing or layoff is to occur
- The state's dislocated worker unit (EDD's Workforce Services Branch)

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[32] Lab. Code sec. 1400(f)
[33] Lab. Code sec. 1400(e)
[34] Lab. Code sec. 1401
[35] 29 CFR sec. 639.3(f)(4)
[36] 29 CFR sec. 639.3(f)(3)
[37] 29 U.S.C. 2102(a); Lab. Code sec. 1401

State law does not contain a provision for giving notice to union employees by notifying their union. Under federal law, you must serve a workforce reduction notice to the union. By doing so, you serve notice to all union employees, and need not serve each employee individually. As a result of state law, you should serve the required notice to each individual employee, whether represented by a union or not, and also serve the union.

WARN Act Notice to Employees

Although they are not counted when determining the size of a closing or layoff, part-time employees are considered affected employees. You must provide them notice.

Under the federal law, an "affected employee" is any employee who was not hired on a temporary basis who may reasonably expect to experience an employment loss due to a proposed plant closing or mass layoff.[38] Under this definition, employees who have been on temporary layoff are entitled to notice if they have a reasonable expectation of recall.

Under both federal and state law, the notice to employees must be specific, and must include:[39]

- A statement as to whether the planned action is expected to be permanent or temporary
- If the entire plant is to be closed, a statement to that effect
- The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated
- An indication of whether bumping rights exist
- The name and telephone number of a company official to contact for further information

The notice can include additional information useful to the employees, such as information on available dislocated employee assistance and, if the planned action is expected to be temporary, its estimated duration.

You can use any reasonable method of delivery, such as personal delivery with optional signed receipt. Insertion of the notice into a pay envelope is another viable option. However, a preprinted notice regularly included in each employee's paycheck or pay envelope does not meet the requirements of WARN. The notice must arrive at least 60 days before separation.[40] Under federal law, if you give notice to the union or affected unions, you need not notity the affected union employees themselves. However, under state law, you must notify each employee individually.

You must also provide notice to employees who may be displaced due to bumping rights. Bumping rights refers to the practice of employees with greater seniority whose jobs have been eliminated replacing employees with less seniority, so the person with less seniority loses his/her job. In these situations, you must determine if employees at other facilities may be bumped.

Notice to Laid Off Employees

In *Kildea v. Electro-Wire Products, Inc.*, a federal appeals court ruled that employees who were already laid off at the time of a WARN-covered plant closing were affected employees with a right to notification when the plant was closed. It was common practice for the organization to recall laid off employees when work flow picked up. The organization typically allowed laid off employees to keep their seniority status when they were recalled to work. The court reasoned that because employees laid off before the plant closure had a reasonable expectation of being recalled, they were affected employees and entitled to 60 days' back pay as a penalty for not receiving a WARN notice. However, the court considered the employer's good-faith belief that notice was not required and reduced the penalty.[41]

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[38] 29 U.S.C. 2101(a)(5)

[39] 29 CFR sec. 639.7(d); Lab. Code sec. 1401(b)

[40] 29 CFR sec. 639.8

In addition, the Fourth Circuit Court of Appeals ruled in *Graphic Communications International Union, Local 31-N v. Quebecor Printing (USA) Corporation*, that employees are entitled to 60 days' notice under the WARN Act before a plant's permanent closure even if the employees suffered an employment loss prior to the closure.[42]

Notice to Transferred Employees

If there is no actual loss of employment, WARN notice is not required.

In *International Alliance of Theatrical and Stage Employees and Moving Picture Machine Operators, AFL-CIO v. Compact Video Services, Inc.*, the court ruled that employees who were transferred from the payroll of one organization to the payroll of another as a result of a sale of assets do not suffer a compensable employment loss under the WARN Act.[43] Compact Video Services sold its assets to ATS Acquisition Company. Compact sent a letter to its 314 employees suggesting that they apply for employment with ATS. ATS then notified all but five of Compact's employees that they would be retained. None of the retained employees missed a day of work due to the transition, though many suffered losses in pay and benefits. The Ninth Circuit Court of Appeals held that the sale of a business does not trigger WARN notice requirements. Because only five employees were not retained by ATS, an employment loss, as defined by the WARN Act, did not occur.

WARN Act Notice to Union

Under federal law, the company must provide notice to each representative of affected employees. This notice must include:[44]

- The name and address of the employment site where the plant closing or mass layoff will occur
- The name and telephone number of a company official to contact for further information
- A statement as to whether the planned action is expected to be permanent or temporary
- If the entire plant is to be closed, a statement to that effect
- The expected date of the first separation
- The anticipated schedule for making separations
- The job titles of positions to be affected and the names of the employees currently holding affected jobs

The notice can include additional information useful to the employees, such as information on available dislocated worker assistance and, if the planned action is expected to be temporary, its estimated duration.

WARN Act Notice to Government Officials

Under federal WARN, an employer must provide written notice to the chief elected official of local government within which such closing or layoff occurs.[45] The employer must also provide written notice to the state dislocated worker unit in the Employment Development Department (EDD), Workforce Services Division in California. See "WARN Act Notice to the State" on page 924.

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[41] *Kildea v. Electro-Wire Products, Inc.*, 144 F.3d 400 (6th Cir. 1998)

[42] *Graphic Communications International Union, Local 31-N v. Quebecor Printing (USA) Corporation*, 252 F.3d 296 (4th Cir. 2001)

[43] *International Alliance of Theatrical and Stage Employees and Moving Picture Machine Operators, AFL-CIO v. Compact Video Services, Inc.*, 50 F.3d 1464 (9th Cir. 1995)

[44] 29 CFR sec. 639.7(c)

[45] U.S.C. sec. 2102, 20 CFR 639.5

In addition to the notifications required under federal WARN, state law requires that notice must also be given to the Local Workforce Investment Board and the chief elected official of each city and county government within which the termination, relocation or mass layoff occurs.[46]

The EDD provides assistance in finding the Local Workforce Investment Area (LWIA) applicable to your layoff and affected community. For more information, see www.edd.ca.gov or call the EDD, Workforce Services Division, WARN Act Coordinator at (916) 654-8008.

Under federal and state law, the notice to government must include:[47]

- The name and address of the employment site where the plant closing or mass layoff will occur
- The name and telephone number of a company official to contact for further information
- A statement as to whether the planned action is expected to be permanent or temporary
- If the entire plant is to be closed, a statement to that effect
- The expected date of the first separation
- The anticipated schedule for making separations
- The job titles of positions to be affected and the number of affected employees in each job classification
- An indication as to whether bumping rights exist
- The name of each union representing affected employees
- The name and address of the chief elected officer of each union

The notice can include additional information useful to the employees, such as a statement of whether the planned action is expected to be temporary and, if so, its estimated duration.

Federal law offers an alternative to the notices to state and local agencies and government officials. Instead, you can give notice to the state dislocated worker unit and to the unit of local government by providing the following information:[48]

- A written notice stating the name and address of the employment site where the plant closing or mass layoff will occur
- The name and telephone number of a company official to contact for further information
- The expected date of the first separation
- The number of affected employees

You must maintain the other information required by law on site. You must make that information readily accessible to the state dislocated worker unit and to the unit of general local government. If this information is not available when requested, it is a failure to give required notice. Because state law requires the same notices as the federal law, this alternative may be available under state law as well. This is another issue that may ultimately be decided in court or by regulation.

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[46] Lab. Code sec. 1401(a)(2)

[47] 29 CFR sec. 639.7(e); Lab. Code sec. 1401(b)

[48] 29 CFR sec. 639.7(f)

WARN Act Notice to the State

You must provide notice to the state dislocated worker unit, part of the EDD. The notice to the state must include:

- The name and address of the employment site where the plant closing or mass layoff will occur
- The name and telephone number of an organization official to contact for further information
- The date of closure or layoff
- The anticipated schedule for making separations
- Job titles of the affected positions and the number of affected employees in each job classification
- An indication as to whether bumping rights exist
- The name of each union that represents affected employees and the name and address of the chief elected officer of each union

Notice to the EDD should be addressed to:

WARN Act Coordinator
Program Communications Unit
Workforce Services Division
Employment Development Department
P.O. Box 826880, MIC 50
Sacramento, CA 94820-0001

Employers may also notify the EDD by email at eddwarnnotice@edd.ca.gov.

Further information about services related to WARN and the required notification may be obtained by contacting the EDD, Workforce Services Division, WARN Act Coordinator at (916) 654-7799.

Exceptions to the 60-Day WARN Notice Requirement

Under limited conditions, the 60-day notice requirement can be reduced or eliminated. Although you can shorten the notice requirement under these exceptions, the WARN Act requires that you give as much notice as possible. You must also provide a brief statement of the basis for reducing the notification period.

WARN Act Exceptions for a Faltering Company

The notice period can be reduced for a “faltering company” that is trying to stay in business by seeking additional capital or business. This provision applies only to plant closings and not to mass layoffs. To avoid giving the full 60-day notice under this exception, you must meet four strict requirements:[49]

- You must have been actively seeking capital or business at the time that the 60-day notice would have been required.
- There must have been a realistic opportunity to obtain the financing or business sought.
- You must show that the financing or business sought, if obtained, would have enabled you to avoid or postpone the shutdown for a reasonable period of time.

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[49] 29 CFR sec. 639.9(a); Lab. Code sec. 1402.5

- You must demonstrate that you reasonably and in good faith believed that giving the required notice would have precluded you from obtaining the necessary capital or business.

Court cases have determined that the "faltering company" exception does not apply to attempted sales of a facility[50] or attempted merger negotiations with another employer.[51] California law requires you to produce documentation of your efforts to seek capital or business and declare the accuracy of documentation under penalty of perjury. [52]

The exception to the WARN notice required by California law does not apply if the employer is merely seeking a buyer for its business, as opposed to seeking capital or business to stay afloat. The employer must prove that it was seeking the capital or business at the time it would have had to give the 60 days' prior notice.[53]

The Department of Industrial Relations (DIR) issued an opinion letter in response to Insync Marketing Solutions, LLC's written request for a determination that it was not required to give 60 days' notice under the WARN Act when it closed its Los Angeles facility on February 20, 2009. Insync believed it qualified for an exemption because it was actively seeking a buyer for its business. It felt that providing notice would cause it to lose customers, employees and potential business investors or purchasers. The DIR explained that because Insync closed its doors on February 20, 2009, it must have been actively seeking capital or business on or about December 22, 2008, to qualify for the exception.

Example of Valid WARN Exception

In another case claiming an exception to the requirement for a WARN notice, Telescape Communications, Inc., provided documentation of its attempt to acquire investors. The company ceased operations on December 12, 2008. Notice would have been required on October 13, 2008.

At that time, Telescape was in communication with another company about a capital investment that would have allowed it to continue in business for at least another year. Telescape had also retained the services of an advisor to assist in finding investors, purchasers, partners, joint ventures and any other business combinations that might save the company.

The DIR agreed that, had Telescape sent the required WARN notice, Telescape's ability to get the additional capital would have been jeopardized. Investors would be unwilling to invest if they thought the company might be closing.[54]

WARN Act Exceptions for Unforeseeable Circumstances

The WARN Act notice period can be reduced if the trigger event is caused by business circumstances that were not reasonably foreseeable 60 days before the mass layoff or plant closing. This is a narrow exception. The WARN Act notice period can be reduced when the closing or layoff was a direct result of a natural disaster, including flood, drought, earthquake, storm, tidal wave or other similar disaster.[55] California exempts closings that result from a physical calamity or act of war.[56]

Federal law contains a narrow exception where the closing constitutes a strike or lockout not intended to evade the law's requirements.[57]

Under these exceptions, you must give as much notice as possible under the circumstances.

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[50] *IUE Local 397 v. Midwest Fasteners Inc.*, 763 F. Supp. 78, (D.N.J. 1990)
[51] *Carpenters District Council v. Dillard Department Stores*, 778 F. Supp. 318 (E.D. La 1991)
[52] Lab. Code sec. 1402.5
[53] Determination re: Request for Exemption under Cal-Warn Act - Insync Marketing Solutions, LLC
[54] Determination re: Request for Exemption under Cal-Warn Act - Telescape Communications, Inc.
[55] 29 CFR sec..639.9(b–c)
[56] Lab. Code sec. 1401 (c)
[57] 29 U.S.C. 2103(2)

The Ninth Circuit Court of Appeals clarified that a mass layoff that occurs for reasons outside the employer's control does not trigger the WARN Act notice requirements. In *Deveraturda et. al. v. Globe Aviation Security Services*, the court found that WARN Act notification was not required because the layoffs did not happen as a result of the employer's own initiative but, instead, at the direction of the federal government. The WARN Act applies only when the *employer* orders a mass layoff.[58]

WARN Act Exceptions for Contract Termination

In *Loehrer v. McDonnell Douglas Corporation*, the Eighth Circuit Court of Appeals ruled that a sudden, dramatic and unexpected termination of a defense contract by the U.S. Navy excused a company from providing employees the required 60 days' notice of a mass layoff. Under the WARN Act, you are excused from providing the full period of notice if unforeseeable business circumstances exist. In *Loehrer*, Congress expressed its support for the project and contract renegotiations were proceeding well. These facts, combined with the government's history of rarely canceling contracts for programs for which Congress stated a need, convinced the court that the contract's loss constituted an unforeseeable business circumstance.[59]

WARN Act Exceptions for Good-Faith Omission

The federal WARN Act provides that a court has the discretion to reduce the amount of any liability or penalty if an employer can prove that:[60]

- An act or omission was committed in good faith.
- The employer reasonably believed that the act or omission did not violate the law.

WARN Act Exception Denied

In a case before the Ninth Circuit Court of Appeals and brought under the federal WARN Act, the court awarded the employees more than $60,000 for lost wages and benefits, plus more than $123,000 in attorneys' fees. The employer laid off about 90 percent of its workers with only one day's notice. Several weeks later, it shut down completely. Employees sued, alleging violation of the WARN Act. They sought pay and benefits that should have been provided during the notice period.

The company argued that it was qualified for three exceptions. Invoking the good-faith exception, the company claimed ignorance of the WARN Act requirements. The court said that ignorance of the law did not meet the good-faith exception.

The company pointed to the refusal of its bank to renegotiate its credit as evidence of a business circumstances exception. The court rejected this exception as well, pointing to evidence that it was not the loss of credit but rather depressed market conditions, increased raw material costs and certain operational problems that were responsible for the closing.

For the "faltering company" exception, the company argued that it was seeking new capital from its bank. The court rejected this defense because no evidence was presented to show that the bank would have denied necessary funding because employees were given a WARN notice.[61]

Penalties for Violating the WARN Act

If you violate the WARN Act, you must pay back pay and benefits to each affected employee for each day of the violation, up to a maximum of 60 work days.[62] Benefits include contributions to the employee's pension plan and maintenance of the employee's welfare benefit plan. If you are self-insured, you must pay your employees the monetary equivalent of the insurance benefit. In addition, you are liable for the cost of any otherwise covered medical expense incurred during the employment loss.

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[58] *Deveraturda, et al v. Globe Aviation Security Services*, 454 F.3d 1043 (9th Cir. 2006)

[59] *Loehrer v. McDonnell Douglas Corporation*, 98 F.3d 1056 (8th Cir. 1996)

[60] 29 U.S.C. 2104 (a)(4)

[61] *Childress v. Darby Lumber, Inc.*, 357 F.3d 1000 (9th Cir. 2004)

Your liability can be offset by:

- Payment of wages and benefits to affected employees during the violation period
- Any other voluntary or unconditional payment from you that was not required by any legal obligation
- Payments to a third party or trustee on behalf of the affected employees

The amount of liability will also be reduced depending upon the amount of notice you give. For example, if you gave 20 days' notice, you will face only 40 days of liability. In addition, you face fines of $500 per day up to a maximum of 60 days for failing to give notice to a local government unit. This penalty is not applicable if you pay each affected employee the amount for which you are liable within three weeks from the date you ordered the plant closing or layoff. Reasonable attorneys' fees may be awarded to the party that prevails in a suit under the WARN Act.[63]

Employees are also entitled to compensation for tips and holiday and vacation pay they would have earned during the time for which the required WARN notice was not given. Employees must prove that they would have earned a specific amount in tips and would have worked the holidays.[64]

❗ Payments received for WARN Act violations do not affect an employee's eligibility for unemployment insurance benefits.[65] For more information on unemployment insurance, see Chapter 16, "Unemployment Insurance."

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62. 29 U.S.C. 2104; Lab. Code sec. 1402

[63] Lab. Code sec. 1402

[64] *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152 (9th Cir. 2001

[65] UI Code sec. 1265.1

Chapter 31

Labor Relations in Private Employment

This section provides an overview of the National Labor Relations Act (NLRA), or "the Act," which is the federal law that governs the relationship between most employers and unions in the private sector.

This section discusses situations in which the NLRA imposes obligations on non-union employers. As described in more detail below, the federal agency that enforces and administers the Act, the National Labor Relations Board (NLRB or the Board), has issued a number of decisions during the course of the current presidential administration that greatly expanded what are considered "protected concerted activities" under the Act.

These include decisions invalidating class action waivers contained in employment arbitration agreements, limiting the ability of employers to keep workplace investigations confidential, and making it difficult to draft a social media policy that makes sense from a business standpoint and also will withstand scrutiny by the NLRB. As would be expected, the Board has also issued several recent decisions that changed the dynamic of the union-employer relationship, as it historically has been known.

Labor law is a dynamic area and it is always difficult to know how to respond to newly-issued Board decisions, especially when the decisions make fundamental changes in the law.

As a result, an employer that finds itself facing a union organizing effort, a claim for violation of employee rights under the NLRA, or who otherwise comes to the attention of the NLRB, should seek assistance from counsel experienced in labor relations matters.

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With more than 800 attorneys in the U.S., London, Shanghai, Melbourne and Sydney, Seyfarth Shaw LLP offers a national platform and an international gateway to serve your changing business and legal needs in litigation, employment, corporate, real estate and employee benefits.

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The National Labor Relations Act

The NLRA created the NLRB and empowered it to administer and enforce the Act. The NLRB was originally comprised of three members who served five-year terms, but subsequently was expanded to five members in 1947. Although not mandated by law, it is customary that no more than three of the five NLRB members may belong to the sitting president's political party at any given time, and the political ideology of the members frequently influences how they approach particular issues.

The NLRA provides employees with certain rights to join together to improve their wages and working conditions, with or without a union. The NLRA essentially limits how employers may react to employees who form or join labor unions, conduct collective bargaining, or take part in strikes and other forms of concerted activity.

The NLRA covers all employers involved in interstate commerce, except airlines, railroads, agricultural operations and government entities, which are governed by other federal or state laws (i.e., the Railway Labor Act, the California Agricultural Labor Relations Act, etc.). The reach of the NLRA also is subject to certain jurisdictional limits. For more information, see "Jurisdictional Standards" on page 932.

As previously stated, the NLRB is the federal agency that enforces and administers the NLRA, which governs relations between unions and employers in the private sector:

- The NLRB determines whether employees want to be represented by a union in dealing with their employers and, if so, by which union. These are known as "representation cases" or "R cases." The NLRB maintains certain procedures and standards of conduct that are at least intended to assure free and fair elections.
- The NLRB also investigates and remedies unfair labor practices by employers or unions. These are known as "unfair labor practice (ULP) charges" or "C cases."

For more detailed information on the NLRB, see "NLRB Powers" on page 936.

The NLRA sets forth the following basic employee rights:

- To self-organize
- To form, join or assist labor organizations
- To bargain collectively about wages and working conditions through representatives of their own choosing
- To engage in other protected "concerted activities" (such as acting together for purposes of collective bargaining or other mutual aid or protection)
- To refrain from any of these activities (however, a union and employer may, in a state such as California, where such agreements are permitted, enter into a lawful union-security clause)

The NLRA prohibits both employers and unions from violating these employee rights by engaging in any unfair labor practices (ULP). If an individual, an employer or a union files a ULP charge, the regional office of the NLRB investigates the facts to determine whether there is reasonable cause to believe a ULP was committed. If the NLRB concludes that reasonable cause existed, it will either attempt to settle the case or, in the absence of settlement, issue a ULP complaint.

Covered Employers

The NLRA covers a broad spectrum of employers, but not all. Some exclusions can be found in the NLRA itself, while others result from the exercise of discretion by the NLRB. Thus, an initial inquiry must be made whenever a representation petition or ULP charge is filed as to the NLRB's jurisdiction over the employer. The minimum number of employees required for the Board's jurisdiction is two; however, the employer must meet the test for engagement in interstate commerce.

Joint Employer Issues

In August 2015, the NLRB issued a long-awaited decision, *Browning-Ferris Industries of California*,[1] that expansively broadened the definition of a "joint employer" — an otherwise unrelated entity that does not hire, fire, supervise or determine the wages and benefits of another employer's employees but that nevertheless bears responsibilities to those employees under the NLRA.

Under the Board's newly expanded definition, two or more otherwise unrelated employers may be joint employers of the same employees under the NLRA "if they 'share or codetermine those matters governing the essential terms and conditions of employment.' In determining whether an employer meets this standard, the initial inquiry is whether there is a common-law employment relationship with the employees in question. If so, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining."

Importantly, the Board will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a "limited and routine" manner.

The NLRB's decision vastly expands the type and number of entities that can be held responsible for unfair labor practice violations and may bear collective bargaining obligations related to employees of a totally separate, independent employer. The ruling will affect most business relationships, union and non-union alike, and may have broad implications for other employment laws and government agencies, such as the Department of Labor, Equal Employment Opportunity Commission and Occupational Safety and Health Administration.

Practical Steps

In response to this ruling, every business should assess the risk of joint employer liability with its suppliers, vendors, contractors, franchisees, service providers or others. There is no single or simple solution to the issue; employers will need to consider each relationship in light of the "industrial realities" outlined by the Board to develop the most effective responses.

The expansive definition of "joint employer" requires employers to review existing agreements. Consult legal counsel with any questions.

In the meantime, employers should consider taking the following steps to protect themselves:

- Review and modify service agreements with third parties (in consultation with legal counsel);
- Ensure that third parties establish separate terms and conditions of employment, employment policies and employee handbooks;

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[1] 362 NLRB No. 186 (August 27, 2015)

- Distinguish the work performed by your employees from the work performed by the other entities' employees;
- Where possible, establish payment structures for service providers not based on wage rates and hours of work rendered by non-employees; and
- Consider broad indemnification agreements with third parties.

Although each situation will be unique and require a thoughtful analysis of the facts, relationships with third parties and business needs, steps can be taken to reduce the risk of a joint employer determination.

The *Browning-Ferris* decision will likely be appealed. However, employers that contract for labor or have other non-traditional worker relationships may want to consult legal counsel to review existing contracts for labor or services and determine what efforts may be made to limit exposure. **There is not one cure-all solution that will work for all employers.**

Jurisdictional Standards

The NLRB exercises its discretion to limit its cases to those involving enterprises whose effect on commerce is substantial. The Board's requirements for exercising its power or jurisdiction are called "jurisdictional standards," and are based on the annual amount of business done by the enterprise or on the annual amount of its sales or of its purchases. The Board does not exercise jurisdiction over racetracks; owners, breeders and trainers of racehorses; or real estate brokers.

The Board's current jurisdictional standards are:

- **Nonretail business:** Direct sales of goods to consumers in other states or indirect sales through others (called outflow) of at least $50,000 a year; direct purchases of goods from suppliers in other states; or indirect purchases through others (called inflow) of at least $50,000 a year.
- **Office buildings:** Total annual revenue of $100,000, of which $25,000 or more is derived from organizations that meet any of the standards except the indirect outflow and indirect inflow standards established for nonretail enterprises. Shopping centers are treated the same as office buildings.
- **Retail enterprises:** At least $500,000 total annual volume of business.
- **Restaurants:** The $500,000 annual gross volume standard, applicable to retail enterprises in general, also covers restaurants.
- **Public utilities:** At least $250,000 total annual volume of business, or $50,000 direct or indirect outflow or inflow.
- **Newspapers:** At least $200,000 total annual volume of business.
- **Radio, telegraph, television and telephone enterprises:** At least $100,000 total annual volume of business.
- **Hotels, motels and residential apartment houses:** At least $500,000 total annual volume of business.
- **Privately operated health care institutions:** At least $250,000 total annual volume of business for hospitals; at least $100,000 for nursing homes, visiting nurses associations and related facilities; and at least $250,000 for all other types of private health care institutions defined in the 1974 amendments to the NLRA. The statutory definition includes any hospital, convalescent hospital, health maintenance organizations, health clinic, nursing home, extended-care facility or other institution devoted to the care of the sick, infirm or aged person. Public hospitals are excluded from NLRB jurisdiction by section 2(2) of the NLRA.

- **Transportation enterprise, links and channels of interstate commerce:** At least $50,000 total annual income from furnishing interstate passenger and freight transportation services; also performing services valued at $50,000 or more for businesses which meet any of the jurisdictional standards except the indirect outflow and indirect inflow of standards established for nonretail enterprises.
- **Transit systems:** At least $250,000 total annual volume of business.
- **Taxicab companies:** At least $500,000 total annual volume of business.
- **Associations:** These are regarded as a single employer, and the annual business of all association members is totaled to determine whether any of the standards apply.
- **National defense:** Jurisdiction is asserted over all enterprises affecting commerce when their operations have a substantial impact on national defense, regardless of whether the enterprises satisfy any other standard.
- **Private universities and colleges:** At least $1 million gross annual revenue from all sources (excluding contributions not available for operating expenses because of limitations imposed by the grantor).
- **Symphony orchestras:** At least $1 million gross annual revenue from all sources (excluding contributions not available for operating expenses because of limitations imposed by the grantor).
- **Law firms and legal assistance programs:** At least $250,000 gross annual revenues.
- **Employers that provide social services:** At least $250,000 gross annual revenues.
- **United States Postal Service**
- **Gambling casinos:** When these enterprises are legally operated, and their total annual revenue from gambling is at least $500,000.

Excluded Employees

Because of the limits set by the jurisdictional standards, the NLRA does not cover the following employees:

- Agricultural laborers
- Domestic servants
- Any individual employed by his parent or spouse
- Independent contractors
- Supervisors (supervisors who have been discriminated against for refusing to violate the NLRA may be covered)
- Individuals employed by employers, such as railroads and airlines, subject to the Railway Labor Act
- Federal, state and local government employees, including those employed at public schools, libraries and parks, Federal Reserve banks and wholly-owned government corporations
- Faculty members in church-operated schools
- Employed by any other person who is not an "employer" as defined in the NLRA

Supervisors and Managers

Supervisors and managers who meet the standards contained in the NLRA and defined by the Board are excluded from NLRA coverage.

The NLRA defines a managerial employee as an employee has discretion in the performance of his/her job and who has authority to formulate, determine, or effectuate employer policies by expressing and making operative the decisions of the employer.[2] Similarly, the Supreme Court has held that an employee who takes or recommends actions that effectively control or implement employer policy is a managerial employee.[3]

The NLRA defines a supervisor as any individual "having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."[4]

The NLRB has clarified that the phrases "exercise independent judgment," "to responsibly direct" and "to assign" the work of others mean:

- Exercise independent judgment: The Board has held that exercise of independent judgment applies regardless of whether the judgment is exercised using professional or technical expertise if it includes exercise of supervisory functions. To "exercise independent judgment" means to make decisions not dictated or controlled by detailed instructions contained in company policies or rules, the verbal instructions of a senior manager or the provisions of the collective bargaining agreement.
- To responsibly direct: The Board has held that the person directing and performing supervisory duties must be accountable for the performance of tasks by their subordinates such that an adverse consequence may befall the supervisor if the tasks performed by the subordinate are not performed properly. The supervisor must have been delegated the authority to direct the work, to take corrective action as needed and be held accountable for the results while carrying out the interests of management.
- To assign: The Board has defined this as the active designating of an employee to a place, appointing an employee to a time or giving significant overall duties to a subordinate employee.[5]

However, several recent NLRB decisions seemingly make it more difficult for an employer to successfully argue that certain employees are supervisors, and thus do not have the right to unionize.

In *Community Education Centers, Inc.*, a divided Board held that shift and unit supervisors at a drug and alcohol treatment facility were not statutory supervisors for two reasons:[6]

1. The Board majority held there was insufficient evidence that the supervisors were held accountable for poor performance by the facility counselors they supervised.

2. Even though the supervisors directed the work of the counselors, the employer did not demonstrate that the shift and unit supervisors exercised independent judgment in performing their duties.

In another case, *G4S Regulated Security Solutions*, the Board held that non-unit lieutenants were not supervisors, despite testimony that they had the authority to administer discipline independently, and documentary evidence of eight disciplinary actions authorized by other lieutenants.

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[2] 29 U.S.C. sec. 152 (2)

[3] *Vance v. Ball State University*, 133 S. Ct. 2434 (2013))

[4] 29 U.S.C. sec. 152(11)

[5] *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006); *Golden Crest Health Care Center*, 348 NLRB No. 39 (Sept. 29, 2006); *Croft Metals Inc.*, 348 NLRB No. 38 (2006)

[6] 360 NLRB No. 17 (2014)

The Board reasoned that the testimony was too "generalized" to establish supervisory status, and, as a result, since the lieutenants were not supervisors, they were entitled to the protections of the Act, and their termination may have violated the Act because they engaged in protected, concerted activity.[7]

Similarly, the mere fact that a company handbook grants authority to supervise and discipline does not render a person a statutory supervisor under the NLRA if the authority is not actually exercised (see *Lucky Cab Co.*, 360 NLRB No. 43 (2014)).

Confidential Employees

The NLRB defines "confidential employees" as employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations, or regularly substitute for employees having such duties.

> **Example:** An employee that helps with collective bargaining matters and takes notes at management meetings where labor contract negotiation strategies are discussed would likely be considered a confidential employee.

Board policy excludes confidential employees from bargaining units because the employees have access to confidential business information. A bargaining unit is a group of employees that are represented by a labor union. Despite this exclusion, confidential employees may still enjoy the NLRA's protections.

Expanding Definition of "Employee"

In 2014, student football players from Northwestern University filed a representation petition seeking representation by the College Athletes Players Association. An NLRB Regional Director ruled that scholarship athletes are subject to the employer's "control." As a result, the scholarship athletes are "employees" under the NLRA with collective bargaining rights.

Northwestern University sought review of the ruling and, on August 17, 2015, the NLRB voted unanimously to dismiss the union's petition on jurisdictional grounds. The NLRB did not address the issue of whether scholarship athletes are "employees" under the NLRA. According to the NLRB, most Division I schools are public colleges and universities not governed by the NLRA. The union cannot appeal the decision any further, because NLRB decisions in representation cases such as these are final. It is now clear that college football players cannot unionize and bargain under the NLRA. This will likely remain the rule for the foreseeable future.

Although avoiding the issue with respect to scholarship athletes, the Board has decided to reconsider whether graduate teaching assistants at private universities should be treated as employees under the NLRA.[8] The case involves a UAW petition to organize graduate students at New York's New School and marks the Obama Board's latest attempt to re-visit, and likely reverse, its decision in *Brown University*, 342 NLRB 483 (2004) in which it held that graduate students performing teaching and research services are not "employees" within the meaning of Section 2(3) of the Act because their relationship with the university was primarily educational.

The Board will likely invite amicus briefing on both sides of the issue in the case. Should the Board reverse its decision in *Brown*, the nation's private colleges and universities can expect a dramatic increase in the efforts of unions to represent their graduate students involved in teaching and research.

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[7] 358 NLRB No. 160 (2012)

[8] *The New School*, Case No. 02-RC-143009

Rights of Employees

The NLRA provides covered employees certain rights to join together to improve their wages and working conditions, with or without a union. Two sections of the NLRA create far-reaching protections for employees in non-union workplaces: Section 7 sets forth the rights of employees, and Section 8 defines unfair labor practices, which can be committed by either employers or labor organizations.

Section 7 of the NLRA sets forth the principal rights of employees:

> *Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).*[9]

Examples of employee rights under Section 7 of the NLRA include:

- Forming or attempting to form a union among the employees of a company
- Joining a union, whether the union is recognized by the employer or not
- Assisting a union to organize the employees of an employer
- Engaging in concerted activity, such as picketing or striking, to secure better working conditions
- Refraining from activity on behalf of a union
- Taking advantage of the NLRB's processes
- Non-union employees coming together to demand an increase in wages or changes to work rules or working conditions

Section 8 of the NLRA covers unfair labor practices committed by either employers or labor organizations. Under Section 8(a), employers are prohibited from committing the unfair labor practices of interfering with, restraining or coercing employees from taking any actions related to the Section 7 guarantee rights.[10]

For more detailed information, see "Unfair Labor Practice Charges" on page 940.

NLRB Powers

The NLRB gets its authority from the power of Congress to regulate interstate commerce under the Commerce Clause of the United States Constitution.

The NLRB has the power to investigate unfair labor practice charges and order employers to follow "make-whole" remedies, such as reinstatement and/or back pay for workers who were wrongfully discharged. The NLRB can also pursue injunction orders from federal courts. For example, an injunction might, among other things, require a party to return to bargaining or to reinstate unlawfully discharged employees.

The NLRB can also direct elections and conduct investigations of unfair labor practices only in cases involving labor disputes that affect, or would affect, commerce.

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[9] 29 U.S.C. sec. 157

[10] 29 U.S.C. sec. 158(a)

“Commerce” includes trade, traffic, transportation or communication within the District of Columbia or any territory of the United States, between any states or territories or between two points in the same state but through any other state, territory, the District of Columbia or a foreign country.

Because the effect on commerce has been very broadly interpreted, the authority of the NLRB could extend to all but purely local enterprises. For example, the operations of a manufacturing company that sells its goods to wholesalers in its own state affects commerce if the wholesalers ship to buyers in other states. The effects of a labor dispute involving the manufacturing company would be felt in other states and the labor dispute would, therefore, “affect” commerce.

The NLRB has two major components — the five-member Board and the Office of General Counsel (OGC). The Board oversees contested matters in either representation or unfair labor practice cases. The OGC is independent from the Board and is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices in processing cases.

NLRB Rulemaking Powers

The NLRB has the authority to engage in administrative “rulemaking.” In its 75-year history, the Board has made little use of its rulemaking authority; instead, formulating law and policy primarily through adjudication.

Since 2012, however, the Board has taken a more aggressive stance regarding rulemaking and enacted two rules; the notice posting rule and the “ambush election” rule. However, the notice posting rule was struck down.

The “Ambush Election” Rule

In 2011, the NLRB proposed major changes to its election procedures in order to expedite the representation and election process. These changes are often referred to as the “ambush election” rule. The NLRB adopted the proposed changes, and the final rule was set to take effect on April 30, 2012. The final rule was challenged on technical grounds, and the rule did not take effect.

Since then, the Board announced “new” proposed rules, which in substance, include the rules originally proposed in 2011. Most recently, the Board announced the final rules on December 15, 2014, and those rules were scheduled to go into effect on April 14, 2015. The Senate passed a joint resolution on March 4, 2015, that would have stopped implementation of the rule through the Congressional Review Act, but President Barack Obama vetoed the resolution.

Other challenges were filed against the rule. Despite two lawsuits filed in federal court, the NLRB has not been barred from implementing and enforcing the new rules. Employers must abide by the new rules until a court rules to the contrary.

The NLRB’s ambush election rules signal the most aggressive use ever of the Board’s regulatory power to accomplish objectives advocated by organized labor.

Private-sector employers should be prepared to see more union organizing activity as a result of these new rules.

For more information on these “ambush election rules,” including practical considerations for employers, see “Representation and Election Process” on page 968.

Power to Investigate, Issue Subpoenas and Obtain Court Orders

To pursue an unfair labor practice charge, the charging party must file and serve its charge within six months after the unfair labor practice occurs. The party files the charge with the relevant NLRB Regional Office and serves copies of the charge on each person against whom the charge is made.

All charges filed with the regional office are investigated, as are petitions for representation elections. The Board and/or its agents may:

- Examine and copy "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question"
- Issue subpoenas on the application of any party to the proceeding requiring the attendance and testimony of witnesses or the production of any evidence
- Administer oaths and affirmations, examine witnesses and receive evidence
- Obtain a court order to compel the production of evidence or the giving of testimony

NLRA Power: Remedies, Not Penalties

The NLRA is not a criminal statute. It is intended to prevent and remedy unfair labor practices, not to punish the person responsible for them. The Board is authorized not only to issue a cease-and-desist order, but "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the] Act."

The Board's order is designed to eliminate the unfair labor practice and undo the effects of the violation, to the extent possible. The Board enjoys considerable discretion in determining the remedy for any given situation. Ordinarily, its determination regarding any particular unfair labor practice will follow a standard form designed to remedy that unfair labor practice. But the Board can, and often does, change the standard order to meet the needs of the case.

In a typical remedial order, the Board may order an employer who engaged in unfair labor practices to:

- Disband an employer-dominated union
- Offer certain named individuals immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges, with back pay and interest
- On request, bargain collectively with a certain union as the exclusive representative of the employees in a certain described unit and sign a written agreement if an understanding is reached

Similarly, the NLRB can also order a union who engaged in unfair labor practices to:

- Notify the employer and the employees that the union has no objection to reinstatement of certain employees or employment of certain applicants whose discriminatory discharge or denial of employment was caused by the union
- Refund dues or fees illegally collected, plus interest
- On request, bargain collectively with a certain employer and sign a written agreement if one is reached

The Board's order usually includes a direction to the employer, the union or both, requiring them to post notices in the employer's plant or the union's office notifying the employees that unfair labor practices will be ceased and informing the employees of any affirmative action being undertaken to remedy the violation.

The Board recently revised its standard notice language, at the request of a charging party union, to include a QR code and hyperlink to a copy of the decision on the Board's website. [11]

For serious and widespread unfair labor practices, the Board has required that its notice be read aloud to the employees by the employer's representative or by a Board agent in the presence of the employer's representative.[12]

Special Proceedings

Certain types of cases require special proceedings, which include the determination of jurisdictional disputes and injunction proceedings.

Proceedings in Jurisdictional Disputes

Section 8(b)(4)(D) of the NLRA prohibits unions from striking or inducing a strike to compel an employer to assign particular work to employees in one union, trade or craft rather than another. For a jurisdictional dispute to exist, real competition must exist between unions or between groups of employees for certain work.

Whenever it is charged that any person engaged in an unfair labor practice in violation of Section 8(b)(4)(D), the Board must hear and determine the dispute out of which the unfair labor practice arises. Section 10(k) provides an opportunity for the parties to adjust the dispute during a 10-day period after notice of the Section 8(b)(4)(D) charge has been served.

At the end of this period, if the parties have not submitted satisfactory evidence to the Board that they adjusted or agreed on a method of adjusting the dispute, the Board is "empowered and directed" to determine which of the competing groups is entitled to have the work.

Investigation Priority

Section 10(l) provides that, whenever a charge is filed alleging a violation of certain sections of the NLRA relating to boycotts, picketing and work stoppages, the preliminary investigation of the charge must receive priority over all other types of cases in the regional office where it is filed. The unfair labor practices subject to this priority concerning the investigation are generally those involving secondary boycotts, recognitional picketing and hot cargo agreements.

Section 10(m) also requires that priority be given to charges alleging violations of Section 8(a)(3), which involves the prohibition against employer discrimination to encourage or discourage membership in a union; and Section 8(b)(2), which forbids unions to cause or attempt to cause such discrimination.

Injunction Proceedings

If the preliminary investigation of any of the priority cases shows reasonable cause to believe that the charge is true and that a complaint should issue, Section 10(l) requires the Board to petition a U.S. district court for an injunction pending the final adjudication of the Board.

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[11] *Durham School Services*, 360 NLRB No. 85 (2014)

[12] *Carey Salt Co.*, 360 NLRB No. 38 (2014)

Furthermore, Section 10(j) gives the Board discretion to petition a federal district court for an injunction to temporarily prevent any unfair labor practice after a complaint has been issued, and to restore the status quo pending the full review of the case by the Board.

Court Review of Board Orders

If an employer or a union fails to comply with a Board order, Section 10(e) empowers the Board to petition the Court of Appeal for a court decree enforcing the order and enjoining conduct that the Board finds to be unlawful.

Section 10(l) provides that any person aggrieved by a final order of the Board may obtain a review of such order in any appropriate federal Circuit Court of Appeals. When the Court of Appeal hears a petition concerning a Board order, the court may enforce the order, remand it to the Board for reconsideration, change it or set it aside entirely. If the Court of Appeal issues a judgment enforcing the Board order, failure to comply may be punishable by fine or imprisonment for contempt of court.

In some cases, the U.S. Supreme Court may be asked to review the decision of a Circuit Court of Appeal, particularly when a conflict exists in the views of different courts on the same important problem.

Unfair Labor Practice Charges

The NLRA prohibits certain acts, called "unfair labor practices," by employers and by labor organizations. The NLRA requires that the Board investigate charges and, where it finds a violation of the law, devise a remedy to redress the effects of the unlawful act. The NLRA is not a punitive statute, and does not provide for punishment of wrongdoers. However, the Board's remedial orders are enforceable in federal courts of appeals, and a violation of a court decree enforcing a Board order may be punished by the court through a civil contempt proceeding.

An employer, a union or an individual can file unfair labor practice charges with the Board's regional office for the region in which the unfair labor practice has occurred. When an unfair labor practice charge is filed, the appropriate regional office conducts an investigation to determine whether there is reasonable cause to believe the NLRA has been violated. If the regional director determines that the charge lacks merit, it will be dismissed unless the charging party decides to withdraw the charge. A dismissal may be appealed to the General Counsel's office in Washington, D.C.

If the regional director finds reasonable cause to believe a violation of the NLRA was committed, the director will seek a voluntary settlement to remedy the alleged violations. If these settlement efforts fail, a formal complaint is issued and the case goes to hearing before an NLRB administrative law judge (ALJ). The ALJ issues a written decision, which may be appealed to the NLRB for a final agency determination. That final determination is subject to review in the federal circuit courts of appeals.

Section 8(a) of the NLRA lists the unfair labor practices of employers and Section 8(b) lists those of labor organizations. Section 8(e) lists an unfair labor practice that can be committed only by an employer and a labor organization acting together. You can find all references to sections of the NLRA at 29 U.S.C. Section 158.

Reading the *Unfair Labor Practices* form may be helpful in getting to know the relationship between the NLRA's various unfair labor practice sections.

Unfair Labor Practices of Employers

The unfair labor practices that may be attributable to employers generally prohibit conduct that interferes, restrains or coerces employees from engaging in any of the activities guaranteed by Section 7 of the NLRA (see "Rights of Employees" on page 936).

Section 8(a)(1) forbids an employer's interference with the rights of employees to organize, to form, join or assist a labor organization, to bargain collectively, to engage in other concerted activities for mutual aid or protection or to refrain from any or all of these activities.

Examples of Section 8(a)(1) violations include the following:

- Threatening employees with loss of jobs or benefits if they should join or vote for a union
- Threatening to close down a plant if a union should be organized in it
- Questioning employees about their union activities or membership in such circumstances that tend to restrain or coerce the employees
- Spying or pretending to spy on union gatherings
- Granting wage increases deliberately timed to discourage employees from forming or joining a union
- Moving production from one location to another in order to discourage union participation or to punish employees for union participation.

Because Section 8(a)(1) is a broad prohibition, employers may also violate this section whenever they commit any of the other employer unfair labor practices described below. This is called a "derivative violation" of Section 8(a)(1).

Unlawful Employer Domination of or Illegal Interference With a Labor Organization

Section 8(a)(2) makes it unlawful for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." This also makes it illegal for an employer to contribute money to a union or to give a union improper advantages denied to rival unions.

A labor organization is considered dominated if an employer interfered with its formation and assisted and supported its operation and activities to such an extent that it must be looked upon as an employer creation instead of the true bargaining representative of the employees.

Certain lesser kinds of employer assistance to a union may constitute unlawful "interference." Employers cannot provide financial support to a union, either by direct payments or indirect financial aid. Permitting employees to confer with management and/or the union regarding grievances or other union business during working hours without loss of pay does not violate this prohibition. However, it is illegal to allow one of several unions seeking to represent employees to solicit on company premises during working hours and deny other unions the same privilege.

When a union is found to be dominated by an employer, the Board will order the organization completely disbanded as a representative of employees. But if the organization is found only to have been supported by employer assistance amounting to less than domination, the Board usually orders an employer to stop such support and to withhold recognition from the organization until it has been certified by the Board as a bona fide representative of employees.

It is also forbidden to recognize a union after an employer knows that a competing union filed a valid petition with the Board requesting a representation election.

When rival unions compete to organize employees, an employer may not give the union that it favors privileges that are denied to the other union. However, when an employer and a union already have an established bargaining relationship, the employer must continue bargaining with the incumbent even though a rival union is attempting to organize the employees. In these circumstances, the rival's filing of a petition does not prevent continued dealing between the employer and the incumbent unless the incumbent lost the support of a majority of the employees.

Discrimination to Encourage or Discourage Union Membership

Section 8(a)(3) of the NLRA makes it illegal to discriminate against employees with respect to "hire or tenure of employment or any term or condition of employment" to encourage or discourage membership in a labor organization. This section also prohibits discrimination because an employee refrained from taking part in such union or concerted activity.

However, Section 8(a)(3) provides that an employee may be terminated for failing to make certain lawfully required payments under a lawful union-security agreement. Employers may deduct these amounts from the wages of their employees and forward them to the union for each employee who voluntarily signed a dues "checkoff" authorization. Such checkoff authorizations may be made irrevocable for no more than one year. Employees may revoke checkoff authorizations after a Board-conducted election in which the union loses its right to maintain a union-security agreement.

If an employer disciplines an employee because the employee violated a work rule and engaged in protected union activity, the discipline is unlawful unless the employer can prove that the same discipline would have occurred even if the employee did not engage in the protected union activity.

An employer engaged in good faith bargaining with a union may lock out the represented employees, sometimes even before impasse is reached in the negotiations, if it is done to further the employer's position in bargaining. But a bargaining lockout may be illegal if the employer also unlawfully bargains in bad faith or completely refuses to bargain. It is also unlawful if the purpose of the lock out is to discourage employees in their union loyalties and activities. A lockout to defeat a union's efforts to organize employees would violate the NLRA, as would the lockout of only those employees who are members of the union.

On the other hand, lawful lockouts are those intended to prevent any unusual losses or safety hazards that would be caused by an anticipated "quickie" strike. Finally, a whipsaw strike against one employer engaged in multi-employer bargaining justifies a lockout by any of the other employers who are party to the bargaining.

Examples of Section 8(a)(3) violations include the following:

- Terminating employees because they urged other employees to join a union
- Refusing to reinstate employees when jobs for which they qualify are open because they took part in a union's lawful strike
- Granting of "super seniority" to those hired to replace employees engaged in a lawful strike
- Demoting employees because they circulated a union petition among other employees asking the employer for an increase in pay
- Discontinuing an operation at one plant and terminating the employees involved, followed by opening the same operation at another plant with new employees because the employees at the first plant joined a union
- Refusing to hire qualified applicants for jobs because they belong to a union
- Refusing to hire qualified applicants because they did not belong to a union, or because they belonged to one union instead of another

Political Speech

Even though employee speech is generally not protected in private workplaces, the NLRA nevertheless may protect both union and non-union employees who speak out about employment issues. Specifically, the NLRA protects employees from discipline if they have engaged in conduct relating to their wages, hours or working conditions.

In addition, protection is extended to advocacy in which there is "direct nexus between the specific issue" being advocated and "a specifically identified employment concern of the participating employees." So, for example, engaging in protests regarding minimum wage issues could be connected to the employee's pay.

In 2008, after a wave of unfair labor practice charges filed by employees who were disciplined for leaving work or for being absent to engage in political protests, the NLRB issued guidelines that explained when political activity is protected:

- Non-disruptive political advocacy for or against a specific issue related to a specific employment concern occurring during non-work time and in non-work areas is generally protected
- On-duty political advocacy related to a specifically identified employment concern can be subject to restrictions imposed by an organization's work rules as long as they are lawful and neutrally applied
- Leaving or stopping work to engage in political advocacy may also be subject to a company's restrictions

Retaliation for Filing Charges or Giving Testimony

Section 8(a)(4) of the NLRA makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he/she has filed charges or given testimony under [the] Act."

An employer violates the Act if the employer discharges, lays off or engages in other forms of discrimination in working conditions against employees who filed charges with the NLRB, supplied affidavits to NLRB investigators or testified at NLRB hearings. Violations of this section in most cases also constitute violations of Section 8(a)(3). For further information, see "Violating an Employer's Duty to Bargain" on page 975.

Employer Unlawful Refusal to Bargain in Good Faith

Section 8(a)(5) of the NLRA makes it illegal for an employer to refuse to bargain in good faith about wages, rates of pay, hours of employment and other conditions of employment with any representative selected by a majority of the employees. A bargaining representative that seeks to enforce its right concerning an employer under this section must show that it has been designated by a majority of the employees, that the unit is appropriate, that there was a demand to bargain, and that the employer refused to do so.

An employer that has an objective reason to believe that a union lost favor with a majority of its employees can only test that loss of majority representative status by refusing to bargain with the union and forcing the union to file a refusal-to-bargain unfair labor practice charge. Alternatively, the employees can file their own petition for decertification if they believe the union no longer has majority status. An employer cannot lawfully withdraw recognition during the life of a collective bargaining agreement or the extension of a collective bargaining agreement, nor can it do so during the "certification year," meaning the first year following the certification of a union's new representative status.

The Board has rejected a union's unfair labor practice charge related to an employer's withdrawal of recognition after it received a petition from a majority of its employees indicating they no longer wanted to have the union represent them shortly after the "certification year" expired. The Board found that although the employees' signatures were gathered within the final hours of the certification year, the petition was not presented until after the close of the certification year, and the employer was within its rights to withdraw recognition. The Ninth Circuit Court of Appeals affirmed the Board's decision.[13]

An employer that believes it has objective evidence that a union has lost majority support — for example, due to a petition signed by a majority of employees — withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer must prove that the union did, in fact, lose majority support at the time the employer withdrew recognition. If the employer fails to do so, the withdrawal of recognition will violate Section 8(a)(5).

Unfair Labor Practices of Unions

Union unfair labor practices largely parallel those of employers, with some exceptions that relate to the power that unions may attempt to influence over their members and over employers other than those whose employees they represent.

The exceptions prohibit conduct that:

- Discriminates or retaliates against employees who engage or refuse to engage in union activity or who use the NLRB's processes
- Interferes with the free selection of a union as collective bargaining representative
- Inhibits the collective bargaining process
- Involves inappropriate parties in labor disputes
- Involves an illegal strike

Restraint and Coercion of Employees

Section 8(b)(1)(A) of the NLRA forbids a labor organization or its agents "to restrain or coerce employees in the exercise of the rights guaranteed in section 7." Union conduct that is reasonably calculated to restrain or coerce employees in their Section 7 rights violates Section 8(b)(1)(A) regardless of whether it succeeds in actually restraining or coercing employees.

A union may violate Section 8(b)(1)(A) by coercive conduct of its officers or agents, of pickets on a picket line endorsed by the union, or of strikers who engage in coercion in the presence of union representatives who do not repudiate the conduct. A finding of union agency is a prerequisite to union liability for unfair labor practices. Conduct that is not attributable to a union agent cannot be the basis of union liability.[14] Unlawful coercion may consist of acts specifically directed at an employee, such as physical assaults, threats of violence and threats to affect an employee's job status.

Making or enforcing illegal union-security agreements or hiring agreements that condition employment on union membership violates Section 8(b)(1)(A), because such action restrains or coerces employees in their Section 7 rights as well as Section 8(b)(2).

A union owes a duty of fair representation to all the employees it represents. It may exercise a wide range of reasonable discretion in carrying out the representative function, but it violates Section 8(b)(1)(A) if it takes or withholds action on their behalf because of their union activities, refusal to support or engage in union activities or for an arbitrary reason, such as an employee's race or sex.

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[13] *Machinists District Lodge No. 190, Local Lodge 1584, International Association Of Machinists And Aerospace Workers, AFL-CIO, Petitioner v. National Labor Relations Board*, 185 Fed. Appx. 581(9th Cir. 2006), unpublished.

[14] *Amalgamated Transit Union, Local 1433*, 360 NLRB No. 44 (2014)

Section 8(b)(1)(A) recognizes the right of unions to establish and enforce rules of membership and to control internal affairs. This right is limited to union rules and discipline that affect the rights of employees as union members and that are not enforced by action affecting an employee's employment. Also, rules must address matters of legitimate concern to unions, such as encouraging members to support a lawful strike or participation in union meetings. A union may not fine a member for filing a decertification petition, although it may expel that individual for doing so. A rule that prohibits a member from resigning from the union is unlawful. The union may not fine a former member for any protected conduct engaged in after he/she resigns.

Examples of Section 8(b)(1)(A) violations include:

- Mass picketing in such numbers that non-striking employees are physically barred from entering the plant
- Acts of force or violence on the picket line or in connection with a strike
- Threats of bodily injury to non-striking employees
- Threats to employees that they will lose their jobs unless they support the union's activities
- Statements to employees who oppose the union that the employees will lose their jobs if the union wins a majority in the plant
- Entering into an agreement with an employer that recognizes the union as exclusive bargaining representative before it has been chosen by a majority of the employees
- Fining or expelling members for crossing a picket line that is unlawful under the NLRA or that violates a no-strike agreement
- Fining employees for crossing a picket line after they resigned from the union
- Fining or expelling members for filing unfair labor practice charges with the board or for participating in an investigation conducted by the board
- Refusing to process a grievance in retaliation against an employee's criticism of union officers
- Maintaining a seniority arrangement with an employer, under which seniority is based on the employee's prior representation by the union elsewhere
- Rejecting an application for referral to a job in a unit represented by the union based on the applicant's race or union activities

Restraint and Coercion of Employers

Section 8(b)(1)(B) prohibits a labor organization from restraining or coercing an employer in the selection of a bargaining representative. A union may not coerce a member who acts as a representative of the employer in the adjustment of grievances.

Examples of Section 8(b)(1)(B) violations include:

- Insisting on meeting only with a company's owners, refusing to meet with the attorney the company engaged to represent the company in contract negotiations and threatening to strike to force the company to accept its demands
- Striking on members of an employer association that bargains with the union as the representative of the employers to compel the employers to sign individual contracts with the union
- Insisting, during contract negotiations, that the employer agree to accept working conditions that will be established by a bargaining group to which the employer does not belong

- Fining or expelling supervisors for the way they apply the bargaining contract while carrying out their supervisory functions or for crossing a picket line during a strike to perform their supervisory duties

Causing or Attempting to Cause Discrimination

Section 8(b)(2) makes it an unfair labor practice for a labor organization to cause or attempt to cause an employer to discriminate against an employee in violation of Section 8(a)(3).

The section is violated by agreements or arrangements with employers, other than lawful union-security agreements, that condition employment or job benefits on union membership, on the performance of union membership obligations or on arbitrary grounds. But union action that causes detriment to an individual employee does not violate Section 8(b)(2) if it is consistent with nondiscriminatory provisions of a bargaining contract negotiated for the benefit of the total bargaining unit, or if the action is based on some other legitimate purpose.

A union's conduct, accompanied by statements advising or suggesting that action is expected of an employer, may be enough to find a violation of this section if the union's action can be shown to be a causal factor in the employer's discrimination.

Contracts or informal arrangements with a union under which an employer gives preferential treatment to union members also violate Section 8(b)(2). However, an employer and a union may agree that the employer will hire new employees exclusively through the union hiring hall if there is no discrimination against nonunion members on the basis of union membership obligations. In setting referral standards, a union may consider legitimate aims such as sharing available work and easing the impact of local unemployment. The union may also charge referral fees if the amount of the fee is reasonably related to the cost of operating the referral service.

A union that attempts to force an employer to enter into an illegal union-security agreement, or that enters into and keeps in effect such an agreement, also violates Section 8(b)(2), as does a union that attempts to enforce such an illegal agreement by bringing about an employee's discharge. Even when a union-security provision of a bargaining contract meets all statutory requirements, a union may not lawfully require the discharge of employees under the provision unless they were informed of the union-security agreement and their specific obligation under it. A union violates Section 8(b)(2) if it tries to use the union-security provisions of a contract to collect payments other than those lawfully required, such as assessments, fines and penalties.

Other examples of Section 8(b)(2) violations include:

- Causing an employer to discharge employees because they circulated a petition urging a change in the union's method of selecting shop stewards
- Causing an employer to discharge employees because they made speeches against a contract proposed by the union
- Making a contract that requires an employer to hire only members of the union or employees "satisfactory" to the union
- Causing an employer to reduce employees' seniority because they engaged in anti-union acts
- Refusing referral or giving preference on the basis of race or union activities when making job referrals to units represented by the union
- Seeking the discharge of an employee under a union-security agreement for failure to pay a fine levied by the union

Union Refusal to Bargain in Good Faith

Section 8(b)(3) makes it illegal for a labor organization that represents the employer's workers to refuse to bargain in good faith with that employer about wages, hours and other conditions of employment. This section imposes on labor organizations the same duty to bargain in good faith imposed on employers by Section 8(a)(5).

Although a union's contract negotiators might try to establish wages and benefits comparable to those contained in other bargaining agreements in the area, the union may not insist on such terms without giving the employer an opportunity to bargain about the terms.

When a union bargains with a group of employers in a multi-employer bargaining unit, the union may withdraw at any time from bargaining on that basis and bargain with one of the employers individually if the individual employer and the multi-employer group agree to the union's withdrawal. In the absence of employer consent, a union may withdraw from multi-employer bargaining by giving the employers notice of its withdrawal near the expiration of the agreement but before bargaining on a new contract has begun.

Section 8(b)(3) also requires the union to carry out its bargaining duty fairly with respect to the employees it represents. A union violates Section 8(b)(3) if it negotiates a contract with racially discriminatory provisions, or if it refuses to handle grievances under the contract for irrelevant or arbitrary reasons.

Examples of other Section 8(b)(3) violations include:

- Insisting on including illegal provisions in a contract, such as a closed shop or a discriminatory hiring hall
- Refusing to negotiate on a proposal for a written contract
- Striking against an employer who bargained, and continues to bargain, on a multi-employer basis to compel it to bargain separately
- Refusing to meet with the attorney designated by the employer as its representative in negotiations
- Terminating an existing contract and striking for a new one without notifying the employer, the Federal Mediation and Conciliation Service and the state and territorial mediation services, if any
- Conditioning the execution of an agreement on inclusion of a non-mandatory provision, such as a performance bond
- Refusing to process a grievance because of the race, sex or union activities of an employee for whom the union is the statutory bargaining representative

Prohibited Strikes and Boycotts

Unions do not have an absolute right to call a strike. Section 8(b)(4) prohibits a labor organization from engaging in strikes or boycotts or taking other specified actions to accomplish certain "objects," as listed in the NLRA. A union commits an unfair labor practice if it takes any actions listed in clauses (i) and (ii) as a means of accomplishing any of the objects listed in subparagraphs (A)-(D) of Section 8(b)(4).

Congress' purpose in drafting Section 8(b)(4) was to preserve the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and shield unoffending employers and others from pressure in controversies not their own.[15]

Clauses (i) and (ii) forbid a union from:

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[15] *NLRB v. Denver Building and Construction Trades Council, et. al.*, 341 U.S. 675, 692 (1951)

- Engaging in a strike or inducing or encouraging a strike, work stoppage or a refusal to perform services by "any individual employed by any person engaged in commerce or in an industry affecting commerce"
- Threatening, coercing or restraining any person engaged in commerce or in an industry affecting commerce

Section 8(b)(4)(i) essentially makes it illegal, under certain conditions, for a union to:

- Engage in a strike or work stoppage
- Induce or encourage others to engage in a strike or work stoppage

Section 8(b)(4)(ii) prohibits threats, coercion and restraint.

But the activities specified in subsections (i) and (ii) will not rise to the level of an unfair labor practice under section 8(b)(4) unless they have one of the following secondary objectives:

- Require an employer or self-employed person to join any union or employer organization or to force an employer to enter a "hot cargo" agreement prohibited by Section 8(e) [see Section 8(b)(4)(A)]. A "hot cargo" agreement is where the union would force an employer to agree to not handle or work on goods or materials going to or coming from any other employer designated by the union as "unfair."

  Examples of Section 8(b)(4)(A) violations include the following:

  - In an attempt to compel a beer distributor to join a union, the union prevents the distributor from obtaining beer at a brewery by inducing the brewery's employees to refuse to fill the distributor's orders
  - In an attempt to secure for its members certain work required at an employer's unloading operation, the union pickets to force the employer to join an employer association with which the union has a contract
  - A union pickets or threatens to picket an employer (one not in the construction and garment industries) to compel that employer to enter into an agreement whereby the employer will only do business with people who have an agreement with a union.

- Enforce a "secondary boycott." A secondary boycott occurs if a union has a dispute with Company A and causes the employees of Company B to stop handling the products of Company A, or otherwise forces Company B to stop doing business with Company A. Specifically, Section 8(b)(4)(B) states the following is unlawful union activity:

  > *Forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [section 159 of this title], if nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.*

  Examples of Section 8(b)(4)(B) violations include the following:

  - Picketing an employer to force it to stop doing business with another employer who refused to recognize the union
  - Asking the employees of a plumbing contractor not to work on connecting air-conditioning equipment manufactured by a nonunion employer that the union is attempting to organize
  - Urging employees of a building contractor not to install doors made by a manufacturer that is nonunion or that employs members of a rival union

  - Telling an employer that its plant will be picketed if that employer continues to do business with an employer the union designated as "unfair"
  - Unlawful action against a secondary employer where the union's object is recognition by the primary employer.
- Force or require any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees [See Section 8(b)(4)(C)]
- Force any employer to assign certain work to "employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class" [See Section 8(b)(4)(D)]

For more information, see "Employee Rights to Strike and Picket" on page 965.

Publicity Allowed by Section 8(b)(4)

Section 8(b)(4) provides that nothing in the section should be construed "to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." But such publicity is not protected if it has "an effect of inducing any individual employed by any people other than the primary employer" to refuse to handle any goods or not perform services.

The Supreme Court ruled that this provision permitted a union to distribute handbills at the stores of neutral food chains asking the public not to buy certain items distributed by a wholesaler with whom the union had a primary dispute. In addition, the Court also held that Section 8(b)(4) does not prohibit peaceful picketing at the stores of a neutral food chain to persuade customers not to buy the products of a struck employer when they traded in these stores.

However, where a product is the subject of picketing and is so integrated with the neutral entity as to constitute a secondary boycott, the union picketing has been deemed unlawful. For example, in one such case, a union picketed restaurants to further its primary dispute with the breadmaker. The restaurants being picketed served the bread in question, and used the bread in virtually all their menu items (sandwiches, toast, bread crumbs, etc.). The NLRB determined that the bread had lost its identity and patrons of the restaurant could not refuse to buy the brand of bread without refusing to purchase the meals.[16]

The Board ruled, "[t]he customer in the restaurant either takes the meal as offered, or goes elsewhere for a meal. Thus, it appears that the bread, like any other foodstuff purchased by a restaurant, loses its identity when served, and becomes a part of the restaurant's product which is offered to its customers. In these circumstances, the picketing in reality was an effort by [the picketers] to induce customers not to eat in these restaurants in order to force the restaurants to cease buying the Employer's bread."

Excessive or Discriminatory Membership Fees

Section 8(b)(5) of the Act makes it illegal for a union to charge employees covered by an authorized union-security agreement a membership fee "in an amount which the Board finds excessive or discriminatory under all the circumstances."

Examples of Section 8(b)(5) violations include:

- Charging existing employees who do not join the union until after a union-security agreement goes into effect an initiation fee of $15 while charging new employees only $5

[illegible] (NLRB 1968)

- Increasing the initiation fee from $75 to $250, thus charging new members an amount equal [at that time] to about four weeks' wages when other unions in the area charge a fee equal to about one-half the employee's first week's pay

Protected Concerted Activity in Union and Non-Union Workplaces

The NLRA, under Section 7 and Section 8(a)(1), protects the rights of employees to engage in "protected concerted activity," which the NLRB generally defines as two or more employees taking action relating to terms and conditions of employment for their mutual aid or protection. The NLRB, in the past few years, has been particularly active in cases involving protection of Section 7 rights.

This right applies to union and non-union employees. The NLRB often enforces these rights in non-unionized settings.

On June 26, 2014, the U.S. Supreme Court issued a decision in the *Noel Canning* case which invalidated many decisions relating to protected concerted activity in the workplace. In *National Labor Relations Board v. Noel Canning*, the U.S. Supreme Court held that President Obama's "recess" appointments to the NLRB were invalid, calling into question any decisions issued by the Board during this time frame.

Since *Noel Canning* was issued, the NLRB reaffirmed many cases affected by the U.S. Supreme Court's ruling and continued to issue decisions that conform with the invalidated Board's expansive view of protected concerted activity.

Examples of protected concerted activities under Section 7 include:

- Two or more employees addressing their employer about improving their pay
- Two or more employees discussing work-related issues beyond pay, such as safety concerns, with each other
- An employee speaking to an employer on behalf of one or more co-workers about improving workplace conditions

The NLRB has also recently held that a single employee may engage in protected concerted activity if he/she acts on the authority of other employees, brings group complaints to the employer's attention, attempts to induce group action or seeks to prepare for group action.

For example:

- In *Lou's Transport, Inc.*, the Board held that a single employee who posted signs in the window of his truck complaining about safety conditions was unlawfully terminated since the employer believed displaying the sign was protected, concerted activity and an employer violates the Act by discharging an employee because the employer believes the employee engaged in concerted activity.[17] This holds true regardless of whether displaying the sign was actually concerted activity and the employee was discharged solely for displaying the sign.
- In *Fresh and Easy Neighborhood Market II*, the Board found that an employee engaged in "concerted activity" when, in support of her own internal sexual harassment complaint, she asked three co-workers to sign a copy of a vulgar and degrading message that had been written about her on a company whiteboard, even though the co-workers complained "that they felt forced to sign the document."[18]

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[17] 361 NLRB No. 158 (2014)

[18] 361 NLRB No. 12 (2014)

- In *St. Rose Dominican Hospitals*, the Board held that a single employee who circulated a petition soliciting signatures from employees who had concerns about a co-worker and presenting those concerns to the co-worker's supervisor was engaged in protected, concerted activity, even if "personal vindication may have been among [the employee's] goals ..."[19]
- In *Triple Play Sports Bar and Grille,* the Board found that an ongoing discussion among four employees on Facebook, including the act of selecting the "Like" option under a former employee's initial status update about an employer's calculation of employee tax withholding, was protected, concerted activity.[20]
- In a 2015 case, *Berkeley Preparatory School, Inc. and Kathi Grau*, the Board denied a private, non-profit, religious school's challenge to a complaint issued by a Regional Director in a case where a teacher yelled to herself "This place sucks!" after being asked by another employee to provide proper documentation for reimbursement of expenses and third-party services.[21]
- In *Hoodview Vending Co.*, the Board held that firing an employee for circulating gossip that someone was going to be fired was in violation of Section 8(a)(1) of the Act because any discussion of "job security" is "inherently concerted."[22] The decision noted that discussion of job security is "concerted even if group action is nascent or not yet contemplated."

The Section 7 right has been interpreted to mean that employees can act together to improve wages and other conditions of employment. Importantly, this right applies to both union and non-union employers.

Recent decisions issued by the Board have further expanded employee protections by re-defining the term "protected concerted activity" in a way that is unprecedented. For example, recent NLRB decisions have attacked the ability of employers to require that workplace investigations be kept confidential, struck down class actions waivers contained in employee arbitration agreements, and even called into question the ability of employers to characterize the employment relationship as being at-will. Many of these decisions are discussed below.

Employer Investigations

In a line of recent decisions, the Board has made it more difficult for an employer to maintain the confidentiality of workplace investigations involving employee interviews because, under Section 7, employees have the general right to discuss workplace issues amongst themselves.

In *Banner Estrella Medical Center*, the Board held that the practice of instructing or even asking employee witnesses to an investigation not to discuss the matter with others until the investigation was complete violated Section 7 of the Act.[23] The Board disregarded the employer's stated concern for the "integrity of its investigations," noting that such a concern was "insufficient to outweigh employees' Section 7 rights."[24]

In a subsequent Memorandum issued by the Board's Division of Advice, the NLRB reiterated the basis for its decision in *Banner Estrella*, stating that "the Employer cannot maintain a blanket rule regarding the confidentiality of employee investigations, but must demonstrate its need for confidentiality on a case-by-case basis." The Memorandum explained that "[a] blanket rule prohibiting employee discussions of ongoing investigations is invalid because it does not take into account the employer's burden to demonstrate a particularized need for confidentiality in any given situation."[25]

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[19] 360 NLRB No. 126 (2014)

[20] 361 NLRB No. 31 (2014)

[21] Case No. 12-CA-136348 (May 6, 2015)

[22] 359 NLRB No. 36 (2012)

[23] 362 NLRB No. 137 (2015)

[24] More recently, the D.C. Circuit Court of Appeals cast doubt on the reasoning of *Banner Estrella*, observing that compliance with anti-discrimination laws may allow employers to adopt internal guidelines limiting employee disclosure of investigative-meeting conversations (*Hyundai Am. Shipping v NLRB*, No. 11-1351 (Nov. 6, 2015)). The [illegible] court in *Hyundai*. Therefore, employers should be aware that the NLRB will continue to ap[illegible] that come before it.

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Similarly, in *Battle's Transportation, Inc.*, the Board held that a medical patient transportation company violated the Act by requiring employees to sign a confidentiality agreement prohibiting the discussion of "investigations by outside agencies (formal and informal)."[26] The Board found the agreement unlawful because it barred employees from discussing human resources information and investigations by outside agencies. The Board stated that employees would construe those phrases to encompass terms and conditions of employment or to mean that employees are restricted from discussing protected activity, such as NLRB complaints or investigations. In addition, the majority found that the portion of the agreement that prohibited an employee from using such information for his or her own benefit or the benefit of others would be construed to limit protected concerted activity.

Yet another NLRB decision, *Piedmont Gardens*, has further encroached on the confidentiality of employer investigations to allow greater flexibility for employees to come together in concert to address workplace concerns. In *Piedmont Gardens*, the Board held that an employer violated Sections 8(a)(1) and (5) of the Act when it failed to provide the union with the names, job titles, and/or written statements of three individuals who purportedly witnessed an employee engage in the misconduct that led to the employee's termination.[27]

The Board noted that if an employer objects to providing witness statements on confidentiality grounds, "the Board balances the union's need for the relevant information against any legitimate and substantial confidentiality interests established by the employer." *Piedmont Gardens* overruled the decades-old decision in *Anheuser-Busch*, which had held that written statements by employee witnesses are exempt from disclosure.[28]

Employers who have questions regarding confidentiality instructions during workplace investigations should seek the advice of counsel.

In distinction to the recent decisions of the NLRB, the U.S. Supreme Court, in *NLRB v. J. Weingarten Inc.*, held long ago that union-represented employees have a right to request a union representative to be present during "investigatory interviews."[29] Investigatory interviews include meetings in which supervisors question employees to obtain information that could be used as a basis for discipline, or in which they ask employees to defend their conduct.

If employees reasonably believe that discipline or other adverse consequences may result from what they say, they have "Weingarten rights" to demand union representation. Union representatives are not limited to observation. They can assist and counsel employees during the meeting. Employers are not required to advise the employee of this right in advance. The right to a union representative applies only to investigatory meetings, not to meetings in which a decision about a disciplinary matter is being communicated.

To exercise his/her Weingarten rights, the employee must make a clear request for representation before or during the interview. After the employee makes the request, employers have three options:

- Grant the request and delay questioning until the representative or co-worker arrives and has the chance to consult privately with the employee
- Deny the request and end the interview immediately

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25. *Advice Memorandum* (Case No. 30-CA-89350) (January 29, 2013)
26. 362 NLRB No. 17 (2015)
27. 362 NLRB No. 139(2015)
28. 237 NLRB 982 (1978)
29. *NLRB v. J. Weingarten Inc.*, 420 US 251 (1975)

- Give the employee a choice of having the interview without representation or ending the interview

Employers cannot punish an employee for making this request.

In 2000, the NLRB decided that a non-union employee is similarly entitled to bring along a co-worker to an investigatory meeting with supervisors.[30] But the NLRB reversed itself in 2004. Three non-union employees of IBM Corp. alleged that they requested, and were denied, co-worker representation during investigatory interviews about workplace harassment. Following their termination, the employees filed unfair labor practice charges against IBM.

In rejecting the charges, the NLRB's decision relied on an employer's need to conduct confidential and discreet investigations in the workplace. The NLRB also commented on the difference between non-union and union work forces, where the presence of a union representative at an investigatory interview is essential to protecting the interests of the entire unit of represented employees.

The NLRB concluded that non-union employees have the right to request the presence of a co-worker at an investigatory interview and cannot be disciplined for making this request. However, employers are not obligated to grant the request in the non-unionized setting.[31] This decision may, however, be reversed once again by the current NLRB.

Accordingly, non-union employers denying requests for representation must tread carefully.

Arbitration Agreements

The NLRB has also issued a series of decisions that restrict the ability of an employer to include a class action waiver in a workplace arbitration procedure. In *D.R. Horton*, the Board held that an employer violated Section 8(a)(1) by maintaining a mandatory arbitration agreement which required the arbitration of disputes, but waived an employee's right to file class or collective actions in any forum.[32] The Board reasoned that such a clause restricted the right of employees to engage in protected concerted activity that affects their working conditions.

The employer in *D.R. Horton* appealed to the Fifth Circuit, which reversed the Board's ruling, rejecting the NLRB's finding that the NLRA afforded employees the non-waiveable right to pursue class actions against their employers. The Board's ruling was subsequently rejected by numerous other federal and state courts.

Nevertheless, in *Murphy Oil USA, Inc.*, the Board reaffirmed the earlier decision in *D.R. Horton*, invalidating a similar arbitration agreement.[33] Notably, the Board was not persuaded by the Fifth Circuit's reversal of *D.R. Horton*, or by the other federal and state court decisions to reject that decision.

Additionally, in *Cellular Sales of Missouri, LLC*, the Board adhered to *D.R. Horton* and *Murphy Oil*, finding that an employer violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration policy that waived the right of employees to maintain class or collective actions in all forums, whether arbitral or judicial.[34] The Board also found that the employer violated the Act because the arbitration policy restricted the right of employees to file charges with the Board.

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[30] *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92 (July 10, 2000); Enforced in relevant part, *Epilepsy Foundation v. NLRB*, 268 F.3d 1095 (2001)

[31] *IBM Corp.*, 341 NLRB No. 148 (June 15, 2004)

[32] 357 NLRB No. 184 (2012)

[33] 361 NLRB No. 72 (2014)

[34] 362 NLRB No. 27 (2015)

The policy stated that "all claims, disputes or controversies arising out of, or in relation to this document or employee's employment with Company shall be decided by arbitration." The Board concluded that in the absence of any limits to this provision, employees would believe it waived or limited their right to file Board charges or to access the Board's processes.

Given these developments, employers should carefully evaluate the pros and cons of maintaining or instituting mandatory arbitration agreements that include class or collective action waivers. Although employers may find many benefits in such agreements, expensive litigation before the NLRB or before federal courts of appeal may follow if challenged. Employers should seek the advice of counsel to evaluate their options in light of the risks involved.

Employee Handbooks and Employment Policies

Over the last few years, the Board has targeted vague and overly broad language in employee handbooks or employment policies because the language may have created a "chilling effect" on protected concerted activity. This approach started with social media policies but was extended to apply to employment-at-will statements, confidentiality provisions, workers' access to company property, dress codes or worker expression policies, prohibitions on certain employee communications both inside and outside the workplace, and non-disparagement policies.

Generally, the Board applies a two-part test to determine whether a workplace policy or rule unlawfully discourages employees from engaging in protected concerted activities

- First, the Board analyzes whether the employer's policy or rule explicitly prohibits concerted activity.
- Second, if the policy or rule does not contain any explicit prohibitions, the Board analyzes whether any of the following are present:
    - Employees would reasonably construe the rule's language to prohibit Section 7 activity;
    - The rule is promulgated in response to union or other Section 7 activity; or
    - The rule has been applied to restrict the exercise of Section 7 rights.[35]

If either of these two tests are met, the workplace policy or rule will be found unlawful.

The Board recently provided additional guidance in, to use the words of the Board's general counsel, this "evolving area of labor law." On March 18, 2015, the NLRB general counsel issued "Memorandum GC 15-04" summarizing recent Board decisions concerning employee handbook rules and policies. The general counsel's stated purpose in issuing this memorandum was to "offer guidance ... with the hope that it will help employers to review their handbooks ... and ensure that they are lawful."

The 30-page memorandum is divided into two parts. The first part of the report discusses the Board's position on eight specific categories of common handbook rules: (1) confidentiality; (2) conduct toward the company and supervisors; (3) conduct towards fellow employees; (4) interaction with third parties; (5) use of company logos, copyrights, and trademarks; (6) photography and recording; (7) employees leaving work; and (8) conflict of interest.

Within each category, the general counsel's report draws upon recent Board decisions to provide a side-by-side analysis of rules found unlawful and rules found lawful and provides explanations and guidance regarding the Board's determinations.

The second part of the report discusses specific handbook rules addressed in a recently settled unfair labor practice charge against Wendy's International, LLC. The report discusses the Board's rationale for its conclusions in the Wendy's case and provides the modified rules agreed to by Wendy's pursuant to the settlement agreement.

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[35] See *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

Although the memorandum is not binding law, employers can look at the examples and consider whether their policies might now be viewed by the Board as having a "chilling effect on concerted activity." In this respect, the memorandum is helpful in attempting to explain the Board's most recent rulings on common categories of workplace rules.

The memorandum also serves as a valuable reminder that the Board continues to assert itself in a predominately nonunion private sector by increasing its scrutiny of various employee handbook provisions and other policies that employers have long used and, until recently, have gone largely ignored by the Board. Several of the Board's recent decisions in this area are discussed below.

In general, employers should consider the following when reviewing handbook policies:

- Use language specifically approved by the Board in the recent memorandum discussing handbooks (Memorandum GC 15-04 discussed above) or in recent Board decisions;
- Avoid vague or ambiguous language and generic terms;
- Avoid broad categories of prohibited or required conduct;
- Provide specific examples of the types of behavior the policies aim to prevent to provide context;
- State why the policy is in place to make clear that the policy is not intended to target Section 7 rights;
- Avoid policies that may appear to workers to prohibit protected activities, such as talking about pay and working conditions, or to compel all employees to confine their concerns to management; and
- Use "savings clauses" throughout a document, when a policy might raise a red flag.

Although a handbook violation under the NLRA does not result in a fine, the Board has overturned discipline, terminations and representation elections because of impermissible or overbroad policy language.

For example, in *Purple Communications, Inc.*, the Board found that an "overbroad" rule that prohibited employees from "causing, creating, or participating in a disruption of any kind during working hours on Company property" was sufficient, by itself, to require setting aside two separate union elections that the company won.[36] The Board took such actions even when the employer argued that it took no steps to enforce the policy.

In *Alternative Community Living, Inc.*, the Board rejected the employer's argument that there was no violation because there was no evidence that the rules were ever in force or implemented.[37] The Board stated that an employer violates Section 8(a)(1) through the mere maintenance of unlawful work rules even in the absence of enforcement or evidence the rules were implemented.

However, in *Landry's Inc.*, the Board found that an employer does not "maintain" an unlawful work rule if the rule has already been superseded by a later version, which was not alleged or found to be unlawful.[38]

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[36] *Purple Communications, Inc.*, 361 NLRB No. 43

[37] *Alternative Community Living, Inc. d/b/a New Passages Behavioral Health*, 362 NLRB No. 55 (2015)

[38] *Landry's Inc.*, 362 NLRB No. 69 (2015)

Although many of these NLRB decisions are indicative of how the Board is approaching workplace rules and policy, the Board's decisions have not been reviewed by the courts. Employers should consult legal counsel with any questions about their handbook and policy language. Regular handbook review is recommended given that the Board's pursuit of unlawful handbook language shows no signs of abating.

At-Will Employment Disclaimers

In a line of cases unfriendly to union and nonunion employers, the NLRB attacked traditional at-will employment disclaimers. Many of these NLRB decisions, while indicative of the direction in which the Board is going, have not been reviewed by the courts. Consult legal counsel with any questions.

In *American Red Cross*, an NLRB ALJ held that requiring employees to agree in writing that "the at-will employment relationship cannot be amended, modified or altered in any way" was unlawful.[39] The ALJ reasoned that the provision reasonably chilled NLRA Section 7 rights because employees may believe they could not engage in protected concerted activity to modify the at-will relationship.

Shortly after *American Red Cross*, the Phoenix, Arizona office of the NLRB filed an unfair labor practice complaint against Hyatt Hotels alleging, among other allegations, that the provisions in Hyatt's handbook regarding at-will employment interfered with Section 7 rights, in violation of Section 8(a)(1). The at-will employment provision at issue stated the following: "I acknowledge that no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and either Hyatt's Executive Vice-President/Chief Operating Officer or Hyatt's President." The Hyatt case was ultimately settled in May 2012 without a decision.[40]

In spite of the NLRB's apparent hostility towards at-will employment disclaimers in *American Red Cross* and *Hyatt*, in December 2012, the Board's Division of Advice issued two Advice Memoranda that upheld at-will employment disclaimers. In *SWH Corporation d/b/a/ Mimi's Café*, the Division of Advice upheld a handbook provision which stated that "[n]o representative of the Company has authority to enter into any agreement contrary to the foregoing 'employment at will' relationship." The Division of Advice reasoned that the provision did not restrict Section 7 rights, but instead merely served to reinforce "the Employer's unambiguously-stated purpose of its at-will policy."[41]

Similarly, in *Rocha Transportation*, the Division of Advice upheld a handbook provision which stated the following: "No manager, supervisor, or employee of Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing." The Division of Advice held that this provision did not restrict Section 7 activity, and also did "not require employees to refrain from seeking to change their at-will status or to agree that their at-will status [could not] be changed in any way."[42]

The Division of Advice distinguished the at-will employment disclaimers at issue in both *SWH Corporation* and *Rocha Transportation* from that held unlawful in *American Red Cross*, discussed above. Unlike the disclaimers at issue in the former two cases, the disclaimer in *American Red Cross* amounted to a waiver "of the employee's right 'to advocate concertedly ... to change his/her at-will status," thereby violating an employee's Section 7 rights.

In 2014, the NLRB's Division of Advice issued a third Advice Memorandum upholding the at-will provision for *Lionbridge Technologies*.[43] The Division concluded that the clause, which stated that only

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[illegible]

[illegible]

[illegible]

[illegible]

the senior vice president of human resources could change an employee's at-will status, would not lead employees to believe it would be futile to attempt to organize to change their at-will status. The language was therefore not directed at inhibiting employee rights but, rather, toward protecting the employer from claims that the handbook was an enforceable employment contract.

Second, the Division also found the last sentence of the policy, which read, "No statement, act, series of events or patterns of conduct can change this at-will relationship," to be lawful. The Division found that employees could reasonably construe the clause as indicating that any actions by them to change their at-will status would be futile.

However, the Division also concluded the language was not a work rule directed at employee conduct, did not threaten discipline for attempting to change at-will status and, most importantly, did not require employees to agree that their at-will status could never be changed. The Division distinguished this rule from its 2012 decisions relating to rules that required employees to agreed that their at-will status could not be "amended, modified or altered in any way."

Although it is still advisable to require an employee to sign an acknowledgment regarding the at-will nature of an employment relationship, a small difference in how the policy is drafted may mean the difference between lawful expression and an NLRA violation. Consult legal counsel with any questions.

Overly Broad Confidentiality Provisions

Employers should be aware that the concept of "concerted activity" under Section 7 is broadly applied to employee actions. The NLRA protects the right of employees to discuss the terms and conditions of employment, which can include topics such as wages, hours, safety, vacation and sick time policies, promotions, hiring and related subjects, regardless of whether the employees are represented by a union.

In this regard, the NLRB determined that an employer, even in a non-union atmosphere, cannot maintain an overly broad confidentiality provision which has the effect of interfering with employee rights under Section 7 of the NLRA.

In the case of *Northeastern Land Services, Limited dba The NLS Group v. NLRB,* the employer maintained, as part of its employee contract, a provision that provided that the "employee understands that the terms of this employment, including compensation, are confidential to employee and the NLS Group. Disclosure of the terms to other parties may constitute grounds for dismissal."[44]

The employer alleged that an employee violated the terms of this confidentiality agreement and discharged the employee. In turn, the employee filed charges with the NLRB claiming that the employer violated the NLRA. The court ruled that it was a violation of Section 8(a)(1) of the Act to maintain or enforce such a prohibition, noting that even the mere maintenance of such a provision would reasonably tend to chill employees in the exercise of their Section 7 rights to discuss conditions of employment. The employee was reinstated and awarded back pay for wages lost resulting from the discharge.

In a more recent decision, the NLRB determined that rules prohibiting employees from sharing private information about sick calls, leaves of absences, workers' compensation injuries, personal health information, payroll, credit card and Social Security numbers as well as employee's names, addresses, telephone numbers and email addresses violated the Act.[45]

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[43] 19-CA-115285 (issued Mar. 31, 2014, released Apr. 18, 2014)

[44] *Northeastern Land Services, Limited dba The NLS Group v. NLRB*, 560 F.3rd 36 (2009)

[45] *Costco Wholesale, Inc.*, 358 NLRB No. 106 (2012); see also *MCPC, Inc.*, 360 NLRB 39 (2014)

In a 2014 case involving Philips Electronics North America, the Board held that an employer's unwritten confidentiality rule prohibiting employees from discussing discipline issues violated the NLRA.[46] The case arose after an employee was terminated, and documentation in the file indicated the termination was based in part on his discussions with co-workers regarding his discipline for sexually harassing a co-worker.

Even though no written confidentiality rule existed and the employer's witnesses denied such a policy existed, the divided Board held the employer followed an unlawful confidentiality policy because the documentation supporting the employee's termination indicated that violation of the confidentiality rule was one of the bases for termination. The Board ultimately upheld the termination on other grounds, but found that the employer engaged in an unfair labor practice by maintaining the unwritten policy of requiring confidentiality regarding employee discipline issues.

In 2014, an NLRB Administrative Law Judge (ALJ) found that MUSE School CA of Calabasas, California, violated the NLRA by implementing an overbroad confidentiality policy that could confuse employees into believing that they were prohibited from discussing wages or other issues related to employment.[47]

The policy prohibited employees from disclosing any information about MUSE or its owners, students and employees. Confidential information included employee compensation and budgets, among other items. The policy also said that former employees were prohibited from making any disparaging remarks about anyone associated with the school in a way that would harm the school's reputation. The ALJ's ruling ordered MUSE to revise its policy to eliminate language that employees could read as prohibiting them from discussing employment-related issues.

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In a 2015 decision in *Battle's Transportation, Inc.*, the Board held that a medical patient transportation company's confidentiality agreement violated the NLRA.[48] The agreement contained a provision that prohibited disclosure of confidential information, to include human resources related information, drug and alcohol screening results, personal/bereavement/family leave information, insurance/workers' compensation, customer lists, investigations by outside agencies, financial, supplier lists and prices, fee/pricing schedules, methods, processes or marketing plans.

The policy, according to the NLRB, was sufficiently vague that an employee could interpret it as barring him/her from engaging in protected, concerted activities, such as discussing "human resources related information," "investigations by outside agencies" or wages. Additionally, the Board found that a clause in the confidentiality agreement that prohibited employees from using confidential information for "his or her own benefit or the benefit of others" was also unlawful.

Furthermore, the company issued a memo to employees about a customer contract that was ending. In that memo, the company advised employees not to discuss any company-related business with company clients. The Board found this prohibition, without qualification, was vague and overbroad. Accordingly, the clause was unlawful as it could be reasonably construed as prohibiting discussion about union-related matters.

It can be expected that employers will challenge the NLRB's position with respect to confidentiality in the federal courts. In the meantime, employers, both with and without union employees, may want to revisit their confidentiality policies to modify language that may be construed as restricting Section 7 rights.

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[46] *Philips Electronics North America*, 361 NLRB 16 (2014)

[47] *MUSE School and Trudy Perry*, Case 31-CA-108671 (Sept. 8, 2014)

[48] 362 NLRB No. 17 (Feb. 24, 2015)

Policies Against Union Insignia

Generally, employers may not prohibit employees from wearing or displaying union insignia unless the policy is justified by special circumstances.[49]

For example, most recently in *Lily Transportation Corporation*, an ALJ found that the company dress code violated the NLRA because it could reasonably be understood to prohibit workers from wearing union insignias or logos on their uniforms.[50] The rule provides that "No articles of clothing may be worn displaying anything other than the Lily logo or Insignia unless specifically approved by Lily Transportation Corp." The ALJ noted that the rule "does not distinguish between wearing a union button as opposed to non-union advertisement" and was, therefore, unlawful.

However, a ban by a *health care employer* on the wearing of all union insignia is presumptively valid as long as the employer does not selectively ban certain insignia. In *Sacred Heart Medial Center*, the NLRB upheld the right of an acute-care medical center to prohibit employees from wearing union buttons stating "RNs demand safe staffing" where employees might encounter patients or their families.

Acknowledging that restrictions on wearing union buttons outside of immediate patient care areas are presumptively invalid, the labor board concluded that the employer had demonstrated special circumstances to justify the restriction. Although there was no evidence of actual disturbance or concern by patients, the labor board found that the buttons sent a clear message to patients that their care is in jeopardy. "An employer need not wait for the awful moment when patients or family are disturbed by a button before it may be lawfully restricted."[51]

Use of Employer's Email System for Protected Activities

Until late 2014, employers thought that they owned their email systems and could limit their use to company business. However, a divided National Labor Relations Board (NLRB) ruled "not so."

In *Purple Communications*, the NLRB ruled that employees who have access to an employer's email system as part of their job generally may, during non-working time, use the email system to communicate about wages, hours, working conditions and union issues. The NLRB reached this conclusion notwithstanding the fact that Purple Communications has a rule providing that its email system was to be used for "business purposes only." Specifically, the NLRB ruled that employees with access to company email can use company email systems for union organization and Section 7 protected activities.[52]

It is expected that the NLRB's ruling will be challenged in the federal courts.

The *Purple Communications* ruling overturned the NLRB's 2007 decision in *Register Guard*, which held that employees have no statutory rights to use their employer's email systems for labor organization purposes or discussions about wages or other workplace issues.[53]

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[49] *W San Diego*, 348 NLRB No. 24 (2006) (permissible to bar hotel workers from wearing union sticker in public areas where the hotel was trying to ensure employees would appear "trendy, distinct and chic" to guests, but impermissible to ban the union sticker in non-public areas); *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837 (6th Cir. 2003) (no special circumstances justified a hospital prohibiting nurses from wearing union buttons)

[50] 01-CA-108618; 362 NLRB No. 54 (March 30, 2015)

[51] *Sacred Heart Medical Center*, 347 NLRB No. 48 (2006)

[52] *Purple Communications*, 361 NLRB No. 126 (2014)

[53] *Register Guard*, 351 NLRB 1110 (2007); *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009)

The NLRB held that Section 7 statutorily protected communications (e.g., communications about labor organizations, wages or other workplace issues) between employees on nonworking time must be permitted by employers that have chosen to provide employees email accounts hosted on the employer's email servers.

In the ruling, the NLRB stated that *Register Guard* initially got the issue wrong because it undervalued employees' Section 7 rights and placed too much emphasis on employers' property rights. Additionally, the majority opined, *Register Guard* incorrectly analogized company email to company-related equipment (e.g., bulletin boards, copy machines, public address systems, etc.).

The NLRB previously determined in an unrelated case that employers could place restrictions on company-related equipment, given its physical size and content limitations. But, for purposes of the current case, the NLRB concluded that this analogy "inexplicably failed to perceive the importance of email as a means by which employees engage in protected communications."

Moreover, the majority noted that since *Register Guard* was decided seven years ago, the importance of email as a means for communication has only increased, further intensifying the error of the *Register Guard* decision.

The NLRB offered some limitations to its ruling. The decision:

- Applies only to employees who already have been granted access to an employer's email system in the course of their work. Accordingly, the ruling does not require employers to provide employees access to the employer's email system in the first place.
- Is limited to allowing access only during non-working time. Employers can still take measures to ensure productive working time — as long as the measures are applied uniformly and consistently.
- Does not prevent employers from being able to monitor computer and email systems for legitimate management reasons, such as ensuring productivity, and making sure email is not being used to harass or disseminate confidential information, as long as doing so fell within the scope of its email system monitoring policies. This effectively means that an employer may not increase its monitoring during a labor "organizational campaign" or "focus its monitoring efforts on protected conduct or union activists" or otherwise enhance their monitoring efforts to stymie protected activity. But, employers may continue to tell their employees that they monitor, or at least reserve the right to monitor, computer and email use for legitimate business reasons. Further, the ruling does not change the general rule that employees have no expectation of privacy when they utilize their employer's email systems. Thus, even though employees' use of their employer's email systems for Section 7 purposes is now protected, employers can still monitor their employees' use of the email system and also advise employees that they are doing just that.
- Does not require employers to allow non-employees, such as union organizers, access an employer's email system.
- Allows employers to ban all non-work-related use of email — including Section 7 email use on non-working time — if the employers can demonstrate that special circumstances make the ban necessary to maintain "production or discipline." Unfortunately, the NLRB stated that the circumstances in which a ban would be justifiable would be "rare." Absent a complete ban, employers may still be able to place uniformly applied controls on the email systems to maintain production and discipline.
- Allows employers to establish restrictions that would interfere with the email system's efficient functioning, such as prohibiting large attachments or audio/video clips.

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Along a similar vein, in *Dalton School*, drama teacher David Brune emailed other faculty members and took exception to the way the school handled the production of a play. The email also accused the head of the school of failing to be "upstanding, moral, considerate, much less intelligent or wise." When the administration learned of the email, Brune was fired.

After Brune's filing of an unfair labor practice charge with the NLRB, the ALJ ruled that the school violated Section 8(a)(1) of the Act by discharging Brune for engaging in concerted protected activity. Specifically, similar to the decision in *Purple Communications*, the ALJ found that Brune used the company system to discuss his "working conditions" and accordingly held that Brune's email was "clearly protected concerted activity" because it was "intended to induce group action." The ALJ determined that the email was sufficiently related to terms and conditions of employment as to render its contents protected by Section 7 of the Act.[54]

In light of these decisions, employers will want to review their email system policies and consider whether they inhibit employees' rights to discuss wages, hours, working conditions and union issues.

Social Media Use and Unfair Labor Practice Charges

Beginning in mid-2011, the Board began to weigh in on how employment-related conversations conducted in the context of social media are impacted by the NLRA. The Board has held that social media postings may constitute protected concerted activity under Section 7 when an employee discusses a posting related to terms and conditions of employment with another co-worker, or when co-workers respond to the posting.

Employers should remember that employees are protected by Section 7 even in non-union workplaces.

For example, if an employee complains about the company's salary structure on Facebook and other employees join in on the Facebook conversation, that social media activity may be protected concerted activity under Section 7 of the NLRA.

The Board has analyzed several social media policies, striking down many as overbroad in that they supposedly restrict the right of employees to engage in protected concerted activities. The NLRB's guidance in this area, and the implications of that guidance, are discussed below. Additionally, although several decisions and memoranda were issued by the *Noel Canning*-invalidated Board, the reasoning and holdings should still be considered persuasive.

NLRB Guidance

The NLRB's Office of the General Counsel (OGC) indicated that social media is an area of significant concern by issuing three memoranda providing guidance in this area:

1. August 18, 2011, memorandum: Approximately 10 cases were analyzed, in which an individual was disciplined or terminated for social media postings. The OGC found in approximately half of these cases that the individual was engaged in protected concerted activity because the individual had discussed the issue with co-workers or co-workers had responded to the social media posting.

   Three different social media policies were also analyzed and nearly all provisions were found to be overly broad. For example, the OGC held that a policy which "prohibited employees from using any social media that may violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity" was overly broad because employees could reasonably construe it to prohibit protected conduct.

2. January 24, 2012, memorandum: Analyzed approximately 10 cases where an employee was disciplined or terminated for social media postings. In approximately half of these cases, the OGC

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[54] *Dalton School Inc. and David Brune*, NLRB Div. of Judges, No. 2-CA-1[illegible]

concluded that the discipline or termination violated the Act, because the employee was engaged in protected concerted activity. Where an employee was not engaged in protected concerted activity, the OGC categorized the social media posting as "venting" or an "individual gripe."

Approximately four other social media policies were also analyzed, and three were found to be overly broad. In one of those decisions, the OGC considered two different versions of a social media policy. The first policy "prohibited discriminatory, defamatory, or harassing web entries about specific employees, work environment, or work-related issues on social media sites." The OGC concluded that this policy was unlawful, as it "would arguably apply to protected criticism of the Employer's labor policies or treatment of employees." The second policy "prohibited the use of social media to post or display comments about coworkers or supervisors or the Employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the Employer's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic." The OGC concluded that this policy was lawful, because it would not "be reasonably understood to restrict Section 7 activity."

3. May 30, 2012, memorandum: Analyzed seven different social media policies, and six of the policies were found to contain unlawful provisions. Only one policy was found to be entirely lawful. Many of the unlawful provisions were ones typically found in employers' social media policies. For example, a prohibition on "disparaging or defamatory" comments was held unlawful on the grounds that employees could reasonably construe it to apply to protected criticism of the employer's labor policies or treatment of employees.

   In addition, the OGC found that a rule "prohibiting employees from posting information regarding the Employer that could be deemed 'material non-public information' or 'confidential or proprietary'" was unlawful because the term "material non-public information" was so vague "that employees would reasonably construe it to include subjects that involve their working conditions." The OGC also concluded that an effort to save a potentially overbroad social media with a clause that stated it "will be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act)" did not save it from being deemed unlawful.

   Finally, as for the social media policy that the OGC found lawful, the principle rationale for this finding was that the "revised social media policy [was] not ambiguous because it provide[d] sufficient examples of prohibited conduct so that, in context, employees would not reasonably read the rules to prohibit Section 7 activity." For example, the OGC found that the rule prohibiting "inappropriate postings," including "discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct" was lawful because it "prohibit[ed] plainly egregious conduct, such as discrimination and threats of violence, and there [was] no evidence that the Employer ha[d] used the rule to discipline Section 7 activity."

Key NLRB and Court Decisions

In addition to the three memoranda issued by the OGC, the NLRB and the Second Circuit have weighed in on the issue of social media, finding social media policies unlawful.[55]

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Most recently, in *Lily Transportation Corporation*, the employer's policy stated that "employees would be well advised to refrain from posting information or comments about [the company], the [company's] clients, [the company's] employees or employees' work that have not been approved by [the company] on the [I]nternet ... [The company] will use every means available under the law to hold persons accountable for disparaging, negative, false or misleading information or comments involving [the company] or [the company's] employees and associates on the [I]nternet ..."[56]

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[55] Again, although *Noel Canning* may have technically invalidated several of the preceding decisions, the reasoning and holdings of these cases should still be considered persuasive.

[56] 01-CA-108618; 362 NLRB No. 54 (March 30, 2015)

In *Durham School Services*, the employer maintained a social networking policy that urged employees who use social media to "limit contact with parents or school officials, and keep all contact appropriate" and required employees to keep "communication with co-workers ... professional and respectful, even outside of work hours." The policy also threatened discipline for "[e]mployees who publicly share unfavorable written, audio or video information related to the company or any of its employees or customers."[57]

The NLRB rejected both of these policies as impermissibly overbroad, finding that the policies:

- Failed to adequately specify the types of information employees were prohibited from posting;
- Failed to adequately distinguish between information the employer could permissibly ask employees not to post and protected speech; and
- Failed to provide examples of social media content the employer would consider "appropriate," "professional," "respectful" or "unfavorable."

In *Triple Play Sports Bar and Grille*, the Board concluded that an employer's Internet/blogging policy which warned that "engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment" was overly broad and unlawfully chilled employees in the exercise of their Section 7 rights.[58] The Board held that an employee would reasonably construe a prohibition on "inappropriate discussions about the company, management, and/or co-workers" to prohibit Section 7 activity.

In 2015, the Second Circuit upheld the NLRB's decision in *Triple Play*, concluding that "employees would reasonably construe the language [in the employer's Internet/blogging policy] to prohibit Section 7 rights."[59] The Second Circuit found that the "employees would reasonably interpret [Triple Play]'s rule as proscribing any discussions about their terms and conditions of employment deemed 'inappropriate' by [Triple Play]."

Similarly, in *Costco Wholesale Corp.*, the Board held that an employer violated Section 8(a)(1) by "maintaining a rule prohibiting employees from electronically posting statements that 'damage the company ... or damage any person's reputation.'" The Board reasoned that the rule clearly prohibited "concerted communications protesting the Respondent's treatment of its employees."[60]

The NLRB has also issued several decisions holding unlawful terminations or discipline issued as a consequence of an employee's social media postings. In *Hispanics United of Buffalo*, the Board held that an employer unlawfully fired five employees because of their Facebook posts and comments about a co-worker who intended to complain to management about their work performance.[61] One of the subsequently fired employees vented on Facebook that a co-worker "felt we don't help our clients enough. I about had it. My fellow workers how do u feel?" Four co-workers responded that the criticism of their job performance was unfair. The Board ruled that the Facebook conversation was concerted activity that was protected. The majority stated that although the employees' mode of communicating their workplace concerns might be novel, the appropriate analytical framework for resolving their discharge allegations has long been settled under the Board's precedent.

In *Design Technology Group LLC*, the Board again held that terminations for social media postings violated the Act.[62] Here, the employees were having a dispute with their manager about the store closing time because the store was in an unsafe neighborhood. The employees made several Facebook

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57. 360 NLRB No. 85 (2014)
58. 361 NLRB No. 31 (2014)
59. *Three D, LLC d/b/a Triple Play Sports Bar and Grille v. National Labor Relations Board*, Nos. 14-3284 (2nd Cir., October 21, 2015)
60. 358 NLRB No. 106 (2012)
61. 359 NLRB No. 37 (2012)
62. 359 NLRB No. 96 (2013)

postings related to this dispute and were terminated after another employee showed the postings to a manager.

The Board reasoned that the terminations violated Section 8(a)(1), because the employees "were engaged in protected concerted activity when they presented the concerns of the employees about working late in an unsafe neighborhood to their supervisor and to the Respondent's owner, and ... their Facebook postings were a continuation of that effort." In addition, the Facebook postings "would have constituted protected concerted activity in and of themselves" because the "postings were complaints among employees about the terms and conditions of employment and about management's refusal to address the employees' concerns."

Similarly, in *New York Party Shuttle*, the Board held that the employer "violat[ed] Section 8(a)(3) and (1) of the Act when it failed to give [an employee] any tour guide assignments after he publicized his union organizational activities and criticized the Respondent's employment practices in similar email and Facebook postings to third parties."[63] The Board reasoned that the posting and email were continuations of the employee's prior union activities, of which the employer was aware.

The Board has not found that all terminations or discipline issued as a consequence of social media postings violate the Act. In *Karl Knauz Motors*, an employee was terminated after posting comments and photos on Facebook regarding two incidents: (1) an accident with a Land Rover where the son of a customer drove the car into a pond; and (2) a promotion event at which the employer served food and drinks to customers. The Board held that the termination was lawful because the employee had been terminated for comments relating to the Land Rover incident, comments that did not constitute protected activity.[64]

In another case, the Board's Division of Advice concluded that an employer did not violate the Act when it fired an employee for profanity-filled comments the employee made about the company in a private Facebook group message. The Division of Advice reasoned that the terminated employee had not engaged in concerted activity, but instead had merely posted about individual gripes, postings which "merely reflected her personal contempt for her returning coworker and for her supervisor, rather than any shared employee concerns over terms and conditions of employment."[65]

Finally, in *Richmond District Neighborhood Center*, the Board held that a Facebook conversation between two employees was not protected because the exchange contained numerous statements advocating insubordination. Two employees of a youth center exchanged messages regarding their plans to stop performing their duties, stop requesting the required permission for youth activities and to, instead, just "play music loud, get artists to come in and teach the kids how to graffiti up the walls." The Board found that the employer did not violate the NLRA by rescinding offers to rehire the employees because of the egregious nature of the material they posted.[66]

Labor Union Actions That Violated the NLRA

In a case involving a labor organization, the NLRB determined that a union violated the NLRA by posting an interrogation videotape on YouTube and Facebook. In this case, a union business agent and three union organizers visited the worksite of a non-union subcontractor. They did not identify themselves or reveal their union affiliation. One carried a video recorder.

They told employees they had to ask some questions, that they were inspecting the job and that they had reports of illegal workers. They asked them about their country of origin, their immigration status and whether or not they had IDs. They asked them how and when they were hired, how they were paid and how they paid their taxes. At various times, the employees tried to resist answering the questions and return to work but the union's agents instructed them not to.

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[63] 359 NLRB No. 112 (2013)

[64] 358 NLRB No. 164 (2012)

[65] *Tasker Healthcare Group, d/b/a Skinsmart Dermatology*, Case No. 04-CA-09422 (May 8, 2013)

[66] 361 NLRB No. 74 (2014)

A local union member edited the video down to approximately four minutes, added written editorial comments, then posted the edited version on YouTube and on the Facebook page of the local union.

The NLRB concluded that the union violated Section 8(b)(1)(a) of the NLRA because the union's actions had a reasonable tendency to restrain or coerce employees attempting to exercise their Section 7 rights.

Practical Considerations For Employers

In light of the cases discussed above and OGC reports, an employer should consider the following questions before taking any disciplinary action with respect to a social media post:

1. Does the post address wages or working conditions? Individual comments by an employee unrelated to working conditions would not be protected.
2. What is the context? Some individual posts may not appear to be protected, but in the context of a broader employee discussion, could be viewed as protected.
3. Does the post trigger an obligation to act? If the post can be properly construed as harassing or contributing to a hostile work environment, the employer may be able to address the issue and attempt to stop the harassment.
4. Who is doing the posting? Supervisors are not protected by the NLRA, but they may be protected by other laws (i.e., whistleblower laws).
5. What about the employer's reputation? When an employer thinks about its social media reputation, it tends to focus on what's embarrassing about the post itself. But, employers also should consider the social media ramifications if it disciplines the employee given the intense public interest in social media firings and the resulting NLRB scrutiny.

Furthermore, employer social media policies should not be so sweeping that they prohibit the discussion of wages or working conditions among employees. The OGC has indicated that specific, robust and appropriately placed Section 7 disclaimers may be useful. Employers should consider specifically including language stating that nothing in the employer's social media policy is intended to infringe on the rights of employees to discuss wages, hours or working conditions, although this disclaimer may not serve to protect an otherwise unlawful policy. The OGC also indicated that employers should give examples in their policies of conduct that would be prohibited and not run afoul of Section 7.

Consult legal counsel when drafting social media policies. Remember, these protections apply even to non-union workplaces.

Employee Rights to Strike and Picket

The NLRA not only guarantees the right of employees to strike, but also places limitations and qualifications on how employees exercise that right. For example, restrictions exist against "secondary strikes" and strikes against health care institutions.

The lawfulness of a strike may depend on the object or purpose of the strike, its timing or the conduct of the strikers. The object(s) of a strike and whether they are lawful are matters not always easy to determine. The status is critical to both striking employees and employers facing a strike because it determines rights to reinstatement and back pay.

Strikes for a lawful object fall into two classes:

- Economic
- Unfair labor practices

Both classes of strikers retain employee status, but unfair labor practice strikers have greater rights of reinstatement to their jobs.

See "Protected Concerted Activity in Union and Non-Union Workplaces" on page 950.

Economic Strike Defined

If the object of a strike is to obtain economic concessions, such as higher wages, shorter hours or better working conditions from the employer, the employees are striking for economic reasons. They retain their status as employees and cannot be discharged, but they can be replaced by their employer. If bona fide permanent replacements fill the jobs of the economic strikers when they apply unconditionally to go back to work, the strikers are not entitled to reinstatement at that time. However, if the strikers do not obtain regular and substantially equivalent employment, they are entitled to be recalled to jobs they are qualified for when such job openings occur.

Unfair Labor Practice Strike Defined

Employees who strike to protest an unfair labor practice committed by their employer are called unfair labor practice strikers. They cannot be discharged or permanently replaced. When the strike ends, unfair labor practice strikers, absent serious misconduct on their part, are entitled to have their jobs back even if employees hired to do their work must be discharged. An economic striker can become an unfair labor practice striker during the course of an economic strike if the employer commits an unfair labor practice, such as failing to bargain in good faith.

If the Board finds that economic strikers or unfair labor practice strikers who have made an unconditional request for reinstatement have been unlawfully denied reinstatement by their employer, the Board may award such strikers back pay starting at the time they should have been reinstated.

Strikes Having Unlawful Purpose

A strike may be unlawful because an object or purpose of the strike is unlawful. A strike in support of a union unfair labor practice or one that would cause an employer to commit an unfair labor practice may be a strike for an unlawful object. For example, it is an unfair labor practice for an employer to discharge an employee for failing to make certain lawful payments to the union when no union-security agreement is in effect. A strike to compel an employer to do this would be a strike for an unlawful object and, therefore, an unlawful strike.

Section 8(b)(4) of the NLRA prohibits strikes for certain objects even though they are not necessarily unlawful if achieved by other means. An example of this would be a strike to compel Employer A to cease doing business with Employer B. It is not unlawful for Employer A voluntarily to stop doing business with Employer B, and it is not unlawful for a union merely to request that it do so. It is unlawful for the union to strike with an object of forcing the employer to do so. Employees who participate in an unlawful strike may be discharged and are not entitled to reinstatement. See "Unfair Labor Practices of Unions" on page 944 for more information on unlawful strikes.

Unlawful Strike in Violation of No-Strike Provision

A strike that violates a no-strike provision of a contract is not protected by the NLRA, and the striking employees can be discharged or otherwise disciplined unless the strike is called to protest certain kinds of unfair labor practices committed by the employer. A strike to protest conditions abnormally dangerous to health has been held not to violate a no-strike provision.

A contractual no-strike, no-picketing clause has been held not to prevent an informational picket line at a shareholders' meeting held at a hotel two months prior to the expiration of its contract to protest the slow pace of negotiations. The contract declared the intention of the company and union to prevent any suspension of work due to labor disputes. The union agreed that it would not call, participate in or sanction any strike, boycott, picketing, work stoppage or slow-down whatsoever. The contract further specified that employees violating this provision are subject to immediate discharge at the discretion of the employer with no recourse to the grievance procedure.

The NLRB ruled that the purpose was to prevent any work suspension due to labor disputes during the term of agreement. The ban on picketing was limited to that causing a suspension of work. The picketing at the shareholders' meeting could not reasonably have been expected to lead to a work suspension. The NLRB will not find a waiver of statutory rights enforceable, such as the right to picket, unless the waiver is "clear and unmistakable."[67]

Section 8(d)[68] provides steps that must be taken to terminate an existing contract. If these requirements are not met, a strike to terminate or change a contract is unlawful and participating strikers lose their status as employees. If the strike was caused by the unfair labor practice of the employer, the strikers are classified as unfair labor practice strikers and their status is not affected by failure to follow the required procedure.

Misconduct of Strikers

Strikers who engage in serious misconduct in the course of a strike may be refused reinstatement to their former jobs. This applies to both economic strikers and unfair labor practice strikers. Serious misconduct includes, among other actions, violence and threats of violence. Examples of serious misconduct that could cause the employees involved to lose their right to reinstatement include the following:

- Physically blocking people from entering or leaving a struck plant
- Threatening violence against non-striking employees
- Attacking management representatives

The U.S. Supreme Court ruled that a "sitdown" strike, when employees stay in the plant and refuse to work, is not protected by the NLRA — it deprives the owner of his/her property.

The Right to Picket

As with the right to strike, picketing can be prohibited because of its object, timing or misconduct on the picket line.

Section 8(b)(7) declares it to be an unfair labor practice for a union to picket for certain objects whether the picketing accompanies a strike or not. This topic is covered in more detail in "Unfair Labor Practices of Unions" on page 944.

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[67] *Engelhard Corp.*, 342 NLRB 46 (2004)

[68] 29 U.S.C. 158(d)

For information on picketing in violation of a no-strike, no-picketing clause in a collective bargaining agreement, see "Unlawful Strike in Violation of No-Strike Provision" on page 967.

Union Picketing on Private Property

In 2012, the California Supreme Court decided an important case relating to union picketing on private property. In a 6-1 vote, the state Supreme Court ruled that "the state's interest in promoting collective bargaining to resolve labor disputes" allows labor unions the right to picket on a privately owned entrance.[69]

In this case, Ralph's Grocery argued that its entrance was privately owned and that the company could regulate speech activities at the entrance. The state Supreme Court first examined whether the California Constitution's free speech provisions protected the picketers. On this point, the Court agreed with Ralph's, ruling that the privately owned entrance area was not a public forum: "For this reason, a union's picketing activities in such a location do not have state constitutional protection."

Despite the fact that the entrance was private property, the court went on to rule that the union had the right to picket there under a California statute known as the Moscone Act. The Moscone Act was passed in 1975 "to promote the rights of workers to engage in concerted activities for the purpose of collective bargaining, picketing or protection and to prevent the evils which frequently occur when courts interfere with the normal process of dispute resolution between employers and recognized employee organizations."[70]

Although other conduct may be limited on the private property, such as a protest or signature gathering, unions have special protections. "Certain activities undertaken during a labor dispute are legal and cannot be enjoined," the court stated. These activities include peaceful picketing on private property.

Employers can still seek an injunction under the Labor Code if unlawful activity, such as violence or blocking customers' ability to enter or exit store property, occurs. For more information, see "Misconduct of Strikers" on page 967. But obtaining an injunction is not an easy task. Labor Code section 11381.1 was enacted in 1999 and added requirements that businesses must meet to obtain an injunction in labor disputes. Although completely independent from the Moscone Act, the statute nonetheless restricts the court's authority from issuing injunctions in such disputes.

Witness testimony in court is required and the testimony must show that unlawful acts have been threatened and will be committed unless restrained and that substantial and irreparable injury will occur. A court order can only be issued if it can be shown that public safety officers who are supposed to protect the property are unable or unwilling to provide adequate protection. These are not easy hurdles to jump.

The *Ralph's* decision has seen some criticism: The court's apparent willingness to protect one type of speech (labor) over another (non-labor) is one of many concerns with the decision. However, in 2013, the U.S. Supreme Court denied review of the California Supreme Court's decision.

Representation and Election Process

The most common method employees use to select a bargaining representative is a secret ballot representation election conducted by the regional director when a petition has been filed requesting one. Alternatively, a union may achieve the status of exclusive bargaining representative through voluntary recognition by an employer through a "card check" process.

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[69] *Ralph's Grocery Company v. United Food and Commercial Workers Union Local 8*, 55 Cal.4th 1083 (2012)

[70] Cal. Civ. Code sec. 527.3(a)

Representation and election questions require consultation with experienced labor counsel. Consult with counsel immediately if you suspect union organizing activities.

The governing law for selecting a bargaining representative is found primarily in section 9 of the NLRA.[71] Selection (or de-selection) can occur by three related processes:

- Employees can file a petition or a union can do so on their behalf, known as an "RC" petition (Certification of Representative)
- An employer can file a petition, known as an "RM" petition (Employer Petition)
- Employees or someone acting on their behalf may file a petition that questions the continued representative status of a current bargaining representative, known as an "RD" petition (Decertification)

The filing of a petition by a union typically follows an intense period of organizing activity by professional union organizers with the support of employees. Among other things, the petition must describe the scope of the unit of employees that is sought to be organized and who may, therefore, vote in a secret-ballot election.

Organizing of small groups of employees, known as "microunits," within a larger facility or establishment has received the endorsement of the NLRB, and may make it easier for unions to get a foothold at some employer facilities.[72]

Furthermore, an employer's conduct during this period is subject to a complex set of rules, any violation of which can result in negative consequences, including:

- Unfair labor practice charges
- Nullification of subsequent results
- An order to bargain with a union without an election or despite the union's loss of an election

In December 2014, the NLRB adopted expedited election rules, often referred to as the "ambush election" or "quickie election" rules. These rules went into effect on April 14, 2015.

These rules have already been challenged in federal court by several business groups. However, until there is a successful challenge in the courts, these rules will remain in effect and will significantly shift the playing field and make it far easier for unions to organize employees. Employers will have less time to educate their employees about the pros and cons of unionization. Moreover, the rules will severely restrict the ability of an employer to challenge improper electioneering by the union or the appropriateness of the proposed bargaining unit.

The newly approved rules include the following changes to existing representation case procedures:

- **Shorter Time for Pre-Election Hearings.** Pre-election hearings will normally be set to open eight days from the date of service of the notice of hearing, except in cases presenting "unusually complex issues" (which the NLRB has not defined).
- **Employer Must Prepare and File a Position Statement to Identify Disputed Issues.** An employer will ordinarily be required to prepare and file a comprehensive "statement of position" by noon on the business day preceding the date of the hearing. In that position statement, the employer must identify any issues regarding the composition of the proposed bargaining unit; day, time and place of the election; and other election-related matters. Any issues omitted by the

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[71] 29 U.S.C. 9

[72] *Macy's Inc.*, 361 NLRB No. 4 (2014); *Specialty Healthcare & Rehab. Ctr.*, 357 NLRB No. 83 (2011), enforced sub nom.; *Kindred Nursing Centers East v. NLRB*, 727 F.3d 552 (6th Cir. 2013)

employer from its statement are waived by the employer and may not be raised later unless the employer can show good cause for the omission.

- **Employer Must File a Preliminary List of Voters as Part of the Required Position Statement.** The employer must also provide a preliminary list of voters with names, work locations, shifts and job classifications in the proposed unit, but without contact information, to the petitioning union (and any other parties) and to the regional director. If the employer contends that the proposed unit is inappropriate, the employer shall separately list the names, work locations, shifts and job classifications of all individuals, if any, that it contends must be added to or excluded from the proposed unit to make it an appropriate unit.
- **More Discretionary Authority to Regional Directors and Less Pre-Election Resolution of Disputes Concerning Unit Placement, Exclusions and Eligibility.** The regional director will decide the issues to be litigated in each case. The hearing officer may solicit offers of proof on any or all issues. If the regional director determines that the evidence described in the offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received.
- **No Right to File a Post-Hearing Brief.** The regional director will have the authority to determine whether parties may file post-hearing briefs.
- **New Excelsior List Requirements.** Employers must provide the full names, home addresses, email addresses, telephone numbers, work locations, shifts, and job classifications of eligible voters within two business days of the regional director's approval of an election agreement or direction of an election. This is not only a shorter time frame (it was seven calendar days), but for the first time requires personal telephone numbers and email information. The rules also require that the list be produced in electronic form unless the employer lacks the capacity to do so. The employer must also provide a preliminary list of voters in addition to the Excelsior List.
- **Earlier Elections.** Eliminates the 25-day period between the date an election is ordered and the date the election is held. Now, elections will be held "as soon as practical," thereby permitting elections to be held as early as only a few days after the regional director's decision (assuming nonemployer parties waive their right to have the Excelsior list at least 10 days before the date of the election).
- **No Right to NLRB Review of Post-Election Disputes.** A party's right to have the NLRB review any decisions by a regional director or an administrative law judge regarding post-election disputes will be eliminated. NLRB review of post-election disputes will become discretionary.
- **Electronic Filing of Petitions and Other Documents Permitted.** Petitions and other documents will be permitted to be filed electronically rather than by hand or regular mail.

Although the Board did not dictate any time frame for the conduct of an election, during the first round of proposed rulemaking, then-Member Brian Hayes indicated that the expedited election process would result in elections taking place between 10 and 21 days after the filing of a petition as contrasted with the current 38 to 45 day time frame.

Practical Considerations For Employers

Employers should consider proactive measures to maintain positive employee relations to minimize the risk of a union organizing petition being filed and to increase their ability to effectively respond to union petitions if filed.

Among other things, employers may want to work with counsel and consider the following actions:

- Develop a strategic, company-wide labor relations plan.

- Conduct appropriate education efforts with both supervisors and hourly employees on unionization and how a union in the workplace can affect them. Topics for such training include the revised NLRB election procedures; their impact on the organization; the significance of authorization cards; early warning signs of union activities; and how to communicate lawfully to employees about unions. Consider regular messaging consistent with the organization's labor relations approach.
- Review your organization for areas of risk and consider ways to address and eliminate legitimate workplace issues now or other ways to cultivate a positive workplace culture.
- Review supervisor designations and the relevant job duties of supervisor positions and consider adjustments based on practical and legal considerations.
- Consider what bargaining unit(s) would be considered appropriate and which employees should be included and excluded from those units. If possible, shape such bargaining units to establish the best units from an employer perspective in light of recent NLRB decisions.
- Develop a representation case litigation plan, including knowing in advance the necessary position statement information and potential legal arguments.
- Consider and prepare certain draft communications to employees that can be finalized quickly in the event of union activity.
- Identify and train a rapid response team who will be ready to act in the event of union activity.

For more information regarding election procedures, visit the NLRB's website at www.nlrb.gov to access the following information:

- GC 15-06 Guidance Memorandum
- FAQs
- Petition forms
- Statement of position forms
- Certificate of service forms

Union Organizing Tactics

Unions may use several tactics to attempt to organize workers in non-union workplaces. Two of the most prominent tactics are described below.

"Salting"

"Salting" is a practice used by unions to organize the employees of a non-union employer by sending in union members, union employees or union sympathizers to apply for employment with the objective of organizing the employer's employees into the union. Some of the applicants will appear to be well-qualified for the position applied for and will hold themselves out to be non-union in the previous employment history.

Once employed, the "salts" will start soliciting union participation from the employees during their time on the job. Once the employer learns of this activity, the union will file charges with the NLRB if any adverse action is taken against any of these employees. Also, these employees may try to provoke the employer to terminate their employment. Such action would expose the employer to possible liability.

Other job candidates will appear to apply for employment while wearing union shirts or insignia, hoping that they will be turned down for employment. If so, the applicants will then file charges with the NLRB, claiming that they were denied employment because of their obvious union support. In *Toering Electric*, the NLRB ruled that to qualify as an "employee" entitled to protection against hiring discrimination based on union affiliation or activity, the applicant must be generally interested in establishing an employment relationship with the employer.[73]

"Corporate Campaigns" and Card Check/Neutrality Agreements

"Corporate Campaigns" are an alternative to traditional "bottom up" or grass roots type organizing — where organizers try to convince employees to sign enough authorization cards to obtain a secret ballot election. "Corporate Campaigns" use a "top down" or "boardroom approach" to organizing.

Whether it is a combination of consumer boycotts, attacks on company directors, shareholder initiatives, or other means, a "corporate campaign" is designed to inflict pain, financially and politically, until the employer's board of directors or top management decides it is preferable not to oppose a union's organizing efforts.

The ultimate goal of a corporate campaign is usually to convince the employer to remain neutral (i.e., not contest the union's efforts to organize employees) as a trade-off for the union stopping the corporate campaign. With a neutrality agreement, unions are typically given access to the workplace and employee contact details, and the employer often agrees to recognize and bargain with the union once it has been able to convince a majority of the employees to sign authorization cards without any secret ballot NLRB election.

In 2013, the United States Supreme Court agreed to review the Eleventh Circuit Court of Appeals decision in *Mulhall v. Unite Here Local 355*, a significant decision in which the court found that neutrality agreements violate the anti-bribery provisions of the Labor Management Relations Act because they provide the union something of value.[74]

The particular question in this case was whether an employer violates the anti-bribery provisions by promising to (1) remain neutral to union organizing and (2) to grant the union limited access to the employer's property and employees in exchange for (3) the union's promise to forego its rights to picket, boycott or otherwise put pressure on the employer's business.

However, later in 2013, the Court dismissed the *Mulhall* case prior to making any decision. The Court decided to dismiss the case without reviewing the merits because the neutrality agreement in this particular case had already expired before the lower court made its decision.[75]

As a result, the lower court's decision that commonly used neutrality agreements amount to bribery still stands, potentially restricting a powerful tool in the union's corporate campaign arsenals.

Employers facing a "corporate campaign" or a request for a neutrality or card check agreement should consult with counsel, especially since the law in this area is evolving and complex.

Exclusive Bargaining Representative

Section 9 of the NLRA contains the general principals governing the selection of a union as the exclusive collective bargaining representative of employees in a bargaining unit.[76] After a union is selected, it retains the right to serve in that capacity until it voluntarily withdraws or is lawfully shown to no longer represent a majority of the employees in the bargaining unit.

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[73] *Toering Electric*, 351 NLRB 225 (2007)

[74] *Mulhall v. Unite Here Local 355*, 667 F.3d 1211 (11th Cir. 2012), cert. granted by 133 S. Ct. 2849 (Jun. 24, 2013)

[75] *Unite Here Local 355 v. Mulhall*, 134 S.Ct. 594 (2013)

[76] 29 U.S.C. 159

After an employee representative has been designated by a majority of the employees in an appropriate unit, the NLRA makes that representative the exclusive bargaining agent for all employees in the unit. As exclusive bargaining agent, the union has a duty to represent equally and fairly all employees in the unit without regard to their union membership or activities. After a collective bargaining representative has been designated or selected by its employees, it is illegal for an employer to bargain with individual employees, with a group of employees, or with another employee representative.

Other Petitions and Elections

In addition to conducting elections to determine the employee bargaining representatives, the NLRA provides for several other elections which relate to the composition of bargaining units and the rights of the exclusive bargaining representative.

Withdrawal of Union Security Authority

This petition, which can also be filed by an individual, seeks an election to determine whether to continue the union's contractual authority to require that employees make certain lawful payments — typically dues, initiation fees or other fee and assessments — to the union to retain their jobs. It must be supported by the signatures of 30 percent or more of the employees in the bargaining unit covered by the union-security agreement. These signatures may be on separate cards or on a single piece of paper. Generally, this showing of interest states that the employees no longer want their collective bargaining agreement to contain a union-security provision.

Once the 30 percent showing of interest is obtained, the NLRB will conduct a secret ballot election to determine if the majority of employees wish to deauthorize the union. The bargaining unit in which any election is conducted will be the same as the unit that is certified or recognized.

This deauthorization petition should be distinguished from the decertification petition, in which employees vote to completely remove the union as their collective bargaining representative.

Unit Clarification

This petition seeks to clarify the scope of an existing bargaining unit by, for example, determining whether a new classification is properly a part of that unit. Either the employer or the union may file this petition. It does not call for an election, but rather for a decision by the NLRB on a question related to the composition of the bargaining unit.

Amendment of Certification

This petition seeks the amendment of an outstanding certification of a union to reflect changed circumstances, such as changes in the name or affiliation of the union. This petition may be filed by a union or by an employer.

Collective Bargaining

Section 1 of the NLRA declares that the policy of the United States is to encourage "the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Duty to Bargain in Good Faith

Good faith bargaining requires the employer and the union to meet at reasonable times, to confer in good faith about certain matters, and to put into writing any agreement reached if requested by either party. Good faith bargaining must occur with respect to wages, hours and other terms or conditions of employment, the negotiation of an agreement, or any question arising under an agreement.

These obligations are imposed equally on the employer and the union. The obligation does not compel either party to agree to a proposal by the other, nor does it require either party to make a concession to the other.

In 2012, the NLRB held that the duty to bargain in good faith about discretionary discipline might be triggered even before there is a first collective bargaining agreement put in place.[77]

Ending or Changing a Contract

Where there is a collective bargaining agreement covering employees in an industry affecting commerce, the duty to bargain collectively means that no party to such contract shall terminate or modify that contract, unless the party desiring such termination or modification does each of the following:

1. Notifies the other party to the collective bargaining agreement, in writing, about the proposed termination or modification 60 days before the date on which the collective bargaining agreement is scheduled to expire. If the collective bargaining agreement is not scheduled to expire on any particular date, the notice in writing must be served 60 days before the time when it is proposed that the termination or modification take effect.
2. Offers to meet and confer with the other party for the purpose of negotiating a new collective bargaining agreement or a collective bargaining agreement containing the proposed changes.
3. Within 30 days after the notice to the party, notifies the Federal Mediation and Conciliation Service of the existence of a dispute if no agreement is reached by that time. The party must also notify, at the same time, any state or territorial mediation or conciliation agency in the state or territory where the dispute occurred.
4. Continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing collective bargaining agreement until 60 days after the notice to the other party was given or until the date the contract is scheduled to expire, whichever is later.

In the case of a health care institution, the requirement in numbers one and four is 90 days and, in number three, is 60 days. In addition, there is a 30-day notice requirement to the agencies in number three when a dispute arises in bargaining for an initial collective bargaining agreement.

! The requirements of numbers two, three and four above cease to apply if the NLRB certifies that the union was replaced by a different representative or was voted out by the employees.

Neither party is required to discuss or agree to any change of the provisions of the collective bargaining agreement if the other party proposes that the change become effective before the provision could be reopened according to the terms of the contract.

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[77] *Alan Ritchey, Inc.*, 359 NLRB No. 40 (Dec. 14, 2012

Subjects of Bargaining

All matters concerning rates of pay, wages, hours of employment or other terms and conditions of employment are "mandatory" subjects of bargaining about which the employer, as well as the employees' representative, must bargain in good faith. Mandatory subjects of bargaining include such matters as pension plans for present employees, bonuses, group insurance, grievance procedures, safety practices, seniority, procedures for discharge, layoff, recall or discipline, and union security. The NLRA does not require either party to agree to a proposal or require the making of a concession.

Certain managerial decisions, such as subcontracting, relocation and other operational changes, may not be mandatory subjects of bargaining even though they affect employees' job security and working conditions. The issue of whether these decisions are mandatory subjects of bargaining depends on the employer's reasons for taking action. Even if the employer is not required to bargain about the decision itself, it must bargain about the decision's effects on unit employees.

On "nonmandatory" subjects, matters that are lawful but not related to "wages, hours and other conditions of employment," the parties are free to bargain and to agree, but neither party may insist on bargaining on such subjects to the point of impasse or as a condition to reaching an ultimate contract.

Violating an Employer's Duty to Bargain

An employer may violate the duty to bargain if the employer's conduct in bargaining, viewed in its entirety, indicates that the employer did not negotiate with a good faith intention to reach agreement. However, an employer's good faith is not at issue when its conduct constitutes an out-and-out refusal to bargain on a mandatory subject. Some examples:

- An employer may not refuse to meet with the employees' representative because the employees are out on strike.
- An employer may not insist, until bargaining negotiations break down, on a contract provision that all employees will be polled by secret ballot before the union calls a strike.
- An employer may not fail to bargain about the effects of a decision to close one of the employer's plants.
- An employer may not dictate to a union its selection of agents or representatives and the employer must, in general, recognize the designated agent. The duty of an employer to meet and confer with the representative of its employees generally includes the duty to deal with whomever is designated by the employees' representative to carry on negotiations.
- An employer may not refuse to supply, upon request, information that is "relevant and necessary" to allow the employees' representative to bargain intelligently and effectively with respect to wages, hours and other conditions of employment. Refusing to supply cost and other data concerning a group insurance plan covering the employees is also a violation of the duty to bargain.
- An employer normally may not make unilateral changes to material terms and conditions of employment without consulting the employees' representative (i.e., announcing a wage increase without consulting the employees' representative is a violation).

Multi-Employer Bargaining

When a history of bargaining exists between a union and a number of employers acting jointly, the employees represented constitute a multi-employer bargaining unit. After such a unit is established, any of the participating employers — or the union — may withdraw from this multi-employer bargaining relationship only by mutual assent or by a timely submitted withdrawal. Withdrawal is considered timely if unequivocal notice of the withdrawal is given near the termination of a CBA, but before bargaining begins on the next agreement.

Successor Employers

An employer that purchases or otherwise acquires the operations of another employer may be obligated to recognize and bargain with the union that represented the employees before the business was transferred. In general, these bargaining obligations exist — and the purchaser is termed a successor employer — when a substantial continuity in the employing enterprise exists despite the sale and transfer of the business.

Whether the purchaser is a successor employer depends on several factors, including the number of bargaining unit employees taken over by the purchasing employer, the similarity in operations and product of the two employers, the manner in which the purchaser integrates the purchased operations into its other operations and the character of the bargaining relationship and agreement between the union and the original employer.

New California legislation, effective January 1, 2016, requires a successor grocery employer to retain eligible workers for a 90-day transitional period and, upon completion of that period, requires the successor grocery employer to consider offering continued employment to those workers. The new law applies to retail stores in California that are more than 15,000 square feet in size and that sell primarily household foodstuffs for offsite consumption.

The new law permits successor employers to establish new terms and conditions for the inherited employees, which may allow for an opportunity to renegotiate any existing union contracts. For more information, please see Chapter 30, “Layoffs and Plant Closings.”

Adjustment of Grievances

Section 9(a) provides that any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted without the intervention of the bargaining representative, if:

- The adjustment is not inconsistent with the terms of any CBA then in effect.
- The bargaining representative has the opportunity to be present at such adjustment.

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